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No. 91-1625

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION

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QUESTION PRESENTED FOR REVIEW

Should this Court grant a writ of certiorari to decide whether 28 U.S.C. § 157, which provides that a bankruptcy court may enter a final order in a core proceeding, violates Article III of the Constitution?

LIST OF PARTIES

The parent corporation of Fleet National Bank is Fleet Financial Group, Inc. All of the subsidiaries of Fleet National Bank are wholly-owned.

The parent corporation of First National Bank of Louisville is First Kentucky National Corporation. All of the subsidiaries of First National Bank of Louisville are wholly-owned.

The parent corporation of First Tennessee Bank National Association is First Tennessee National Corporation. All of the subsidiaries of First Tennessee Bank National Association are wholly-owned.

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No. 91-1625

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THE CAIN PARTNERSHIP, LTD.,

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vs.

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BRIEF IN OPPOSITION FOR RESPONDENTS FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION

STATEMENT OF THE CASE

A. Introduction.

Petitioner argues that it constitutes a violation of Article III of the Constitution for a bankruptcy court to issue a final order in a core proceeding under the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). In this case, the bankruptcy court made a final determination that the lease between the Cain Partnership, Ltd. ("Cain Partnership") and Pioneer Investment Services Company ("Pioneer") did not terminate automatically prior to Pioneer's bankruptcy petition and thus, could be assumed under 11 U.S.C. § 365. The district court affirmed that decision on appeal. Contrary to the petitioner's assertions, the Sixth Circuit Court of Appeals did not specifically hold that the proceeding concerning Pioneer's motion to assume the lease and Cain Partnership's motion to terminate the automatic stay was a noncore proceeding.[1] The Sixth Circuit did not disturb the lower courts' determinations that the proceeding was core. The Sixth Circuit held that even if the proceeding were noncore, the bankruptcy court could permissibly enter a final order under 28 U.S.C. § 157 because the parties had consented to the jurisdiction of the bankruptcy court.

B. Facts.

On April 12, 1989 Pioneer filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Pioneer's main assets

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1. The Sixth Circuit held: "The Bankruptcy Court and District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a noncore but related proceeding because of the underlying issue involved, we nevertheless conclude that the Bankruptcy Court had jurisdiction to hear and determine this proceeding even if it is noncore based on the consent of the parties." (App. Z, Petition for Writ of Certiorari).

included the Towne and Country Shopping Center and The Commons located in part on the property covered by the lease that is the subject of this lawsuit. Pioneer listed an unexpired lease of nonresidential real property with Cain Partnership as an asset in its schedules of assets. Pioneer subsequently filed a motion to assume the lease, as permitted by 11 U.S.C. § 365. This was a core proceeding. 28 U.S.C. § 157(b)(2)(G).

Cain Partnership filed a motion for relief from the automatic stay so that it could terminate the lease. This was a core proceeding. 28 U.S.C. § 157(b)(2)(M). Cain Partnership claimed that the lease had automatically terminated prior to the bankruptcy petition when Pioneer failed to pay its property taxes, a default under the lease. Cain Partnership asked the bankruptcy court to order Pioneer to turn over the leased premises to the partnership (App. A). In its brief in support of its motion for relief from the stay, filed on May 24, 1989, Cain Partnership stated: "It is the contention of the Partnership that the [bankruptcy] court has sufficient jurisdiction over Debtor to require the turnover [of the leased premises] and that exercise of that jurisdiction is appropriate under the circumstances." (App. B).

Cain Partnership also stated to the bankruptcy court:

> Because the Lease will probably constitute a substantial portion of the value reported as property by Debtor, to refer the matter to state court to be resolved, in essence, would amount to turning this entire case over to General Sessions. If this court determined that the Lease was terminated prior to April 12, 1989, for this court to refer the matter to state court for eviction proceedings, likewise, might seem to catapult form over substance. The state court would be bound by the law of the case with respect to the issue

> of termination and would have nothing more to do than issue writs and occupy the time of the Sheriff when the same might be more simply accomplished by this court.

(App. B).

The Bankruptcy Code provides that thirty (30) days after a motion for relief from the stay, the stay is terminated with respect to the movant unless the court, after notice and a hearing, orders the stay to remain in effect pending the result of a final hearing and determination. 11 U.S.C. § 362(c). Cain Partnership entered an agreed pretrial order prior to the thirty (30) day deadline which provided:

> The Cain Partnership, Ltd. and all other parties agree that the automatic stay of 11 U.S.C. § 362 shall remain in effect until further orders of this Court pending a final decision of the Court on the motion of The Cain Partnership, Ltd, to lift the stay.

(App. A, Petition for Writ of Certiorari). At no time prior to its Rule 60 motion, filed three (3) months after its stay relief motion, did Cain Partnership assert that the bankruptcy court could not enter a final order.

The bankruptcy court conducted a hearing to consider both motions concerning the lease. The issues presented were (1) whether the lease had terminated prior to Pioneer's bankruptcy petition and (2) whether the debtor could satisfy the statutory requirements for assumption of the lease. The bankruptcy court decided that the lease had not terminated. The bankruptcy court granted Pioneer's motion to assume the lease and denied Cain Partnership's motion for stay relief.

Cain Partnership appealed to the United States District Court for the Eastern District of Tennessee. After the district court affirmed the bankruptcy court's decision, Cain Partnership appealed to the Sixth Circuit. During its appeal to the Sixth Circuit, Cain Partnership for the first time asserted that the bankruptcy court lacked subject matter jurisdiction to determine whether the lease had terminated. During the pendency of the Sixth Circuit appeal, Cain Partnership filed Rule 60 motions in the bankruptcy court and the district court challenging the bankruptcy court's jurisdiction to enter a final order. The district court denied the Rule 60 motion and Cain Partnership appealed the ruling to the Sixth Circuit.

The Sixth Circuit affirmed both decisions by the district court. It did not specifically reach the question of whether the proceeding was core or noncore. The court held that even if the proceeding were noncore, the bankruptcy court had jurisdiction to enter a final decision based on the parties' consent to jurisdiction.

MISSTATEMENTS OF LAW AND FACT IN PETITION FOR WRIT OF CERTIORARI

The petitioner has misstated aspects of the facts and law in this case. Contrary to the petitioner's assertions on page 8 of its petition, Cain Partnership did not overtly challenge the ability of the bankruptcy court to issue a final order in the proceedings concerning the partnership's motion to lift the stay and Pioneer's motion to assume the lease at the beginning of the bankruptcy case. The first time that Cain Partnership challenged the bankruptcy court's jurisdiction was in its Rule 60 motion, filed after its appeal to the Sixth Circuit. To the contrary, Cain Partnership expressly consented to the entry of a final order in its motion to lift the stay (App. A), its memorandum in support of that motion (App. B), and the pretrial order (App. A, Petition for Writ of Certiorari). Petitioner persists in making the false

assertion of "no consent" to the bankruptcy court's jurisdiction throughout its petition.[2]

Similarly, petitioner asserts that it was "not given an opportunity by the bankruptcy judge to express a position with respect to whether the proceeding was core or noncore, or with respect to consent." (Petition for Writ of Certiorari, p. 7). Not only did petitioner have an opportunity to express an opinion, petitioner did express the opinion that the bankruptcy court had jurisdiction to enter a final order in these proceedings (App. A, App. B, App. A in Petition for Writ of Certiorari).

Petitioner has also misstated the Sixth Circuit's opinion in this case. The Sixth Circuit did not hold that *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), prohibited the proceeding from being classified as core, as stated on page 3 of the petition. The Sixth Circuit held that even if the proceeding were noncore, the bankruptcy court had jurisdiction to issue a final order because the parties had consented.[3] The Sixth Circuit never stated that "the bankruptcy judge below could not, consistent with Northern Pipeline, enter a final order in Cain's lease dispute, notwithstanding that it arose in a 'core proceeding,' " as asserted on page 11 of the petition.

SUMMARY OF ARGUMENT

It does not violate Article III of the Constitution for a bankruptcy court to issue a final order in a core proceeding. Motions to lift the automatic stay and to assume leases are core proceedings. Even if these proceedings were noncore, the parties expressly consented to the entry of a final order of the bankruptcy

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2. *See* Petition for Writ of Certiorari, pages 7 and 26-27.

3. *See* note 1, *supra*.

court, which is also constitutionally permissible. In view of the clear evidence of express consent in this case, this case is not the proper vehicle for deciding issues of implied consent.

REASONS FOR DENYING THE WRIT

I.

IT DOES NOT VIOLATE ARTICLE III OF THE CONSTITUTION FOR A BANKRUPTCY COURT TO ISSUE A FINAL ORDER IN A CORE PROCEEDING UNDER BAFJA.

This Court has previously confronted the issue of the constitutionality of the federal bankruptcy laws. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985). Thus, this Court held that the Bankruptcy Act of 1978 was unconstitutional. *Northern Pipeline*, 458 U.S. at 84.

In response to *Northern Pipeline*, Congress enacted BAFJA. *In re Production Steel*, 48 Bankr. 841, 845 (M.D. Tenn. 1985).[4]

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4. Many lower courts have held that BAFJA is constitutional. *See In re Rheuban*, 128 Bankr. 551, 563 (Bankr. C.D. Cal. 1991) (listing cases). In addition, seven circuit courts have held that the Emergency Rule, promulgated by Congress to fill the gap after *Northern Pipeline* until BAFJA, was constitutional. *In re Hansen*, 702 F.2d 728 (8th Cir. 1983); *White Motor Corp. v. Citibank*, 704 F.2d 254 (6th Cir. 1983); *In re Braniff Airways*, 700 F.2d 214 (5th Cir.), *cert. denied sub nom., American Airlines v. Braniff Airways*, 461 U.S. 944 (1983), (Cont'd)

Congress vested the judicial power exercised under Title 11 in the district courts. 28 U.S.C. § 1334. Bankruptcy judges are selected by the circuit courts of appeals. 28 U.S.C. § 152(a)(1) and (e). District courts may refer proceedings arising under Title 11 or related to a case under Title 11 to a bankruptcy court. 28 U.S.C. § 157(a). Even after referral of bankruptcy cases, district courts retain the power to withdraw the reference on their own motions or upon the motion of any party for cause. 28 U.S.C. § 157(d). Bankruptcy judges may only enter final orders in core proceedings. 28 U.S.C. § 157(b). In noncore proceedings, bankruptcy judges may only enter proposed findings of fact and conclusions of law absent consent of the parties. 28 U.S.C. § 157(c). All orders of the bankruptcy courts are appealable to district courts. 28 U.S.C. § 158.

Petitioner's main argument is that the referral of core proceedings to non-Article III bankruptcy courts is unconstitutional. Core proceedings, under the Bankruptcy Code, are those matters at the core of the adjustment of debtor-creditor relationships. Core proceedings include:

> A. Matters concerning the administration of the estate;
>
> B. *Motions to terminate, annul or modify the automatic stay;*
>
> C. *Orders approving the use or lease of property, including the use of cash collateral;*

(Cont'd)

Coastal Steel v. Telghman Wheelabrator, Ltd., 709 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); *Salomon v. Kaiser*, 722 F.2d 1574 (2d Cir. 1983). BAFJA codified the Emergency Rule with only one change: the standard of review in core proceedings. *In re Tom Carter Enterprises*, 44 Bankr. 605, 609 (C.D. Cal. 1984).

> D. Other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157(b)(2) (emphasis added). Thus, the proceedings involving Pioneer and Cain Partnership were clearly core.

Core proceedings listed in 28 U.S.C. § 157 involve public rights as this Court has used that term. Public rights do not require a dispute between the government and an individual. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586 (1985); *Granfinanciera v. Nordberg*, 492 U.S. 33, 54 (1989). This Court looks to substance, rather than form, to determine whether public rights are at issue. *Thomas*, 473 U.S. 587. "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 593.

Motions to assume an unexpired lease or terminate the automatic stay involve public rights. The right of a debtor to reorganize its affairs in bankruptcy is a federal right explicitly recognized both by the Constitution and Congress. *In re Skinner*, 917 F.2d 444, 449 (10th Cir. 1990) (quoting *In re Walters*, 868 F.2d 665, 670 (6th Cir. 1989)). "The imposition of an automatic stay by the bankruptcy court is central to the exercise of that right." *Id.* Congress designed the automatic stay to protect the debtor from its creditors and give the debtor the necessary breathing room to reorganize its affairs and emerge as a productive member of society. *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986). The importance

of the automatic stay is set forth in the legislative history of 11 U.S.C. § 362:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H. Rep. No. 95-595, 95th Cong., 2d Sess. 340-2; S. Rep. No. 95-989, 95th Cong., 2d Sess. 54-55, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5840-41 and 6296-7. A motion to terminate the stay directly affects the debtor's rights to protection under the federal bankruptcy laws. It would be virtually impossible to restructure the debtor's affairs if the bankruptcy court could not determine whether to continue the automatic stay over the objection of creditors.

The only reason advanced by petitioner for according the dispute in this case "private rights" status is that the resolution of the issue requires referral to state law. Many aspects of bankruptcy law depend on a determination of state law — *i.e.*, whether a creditor is secured or unsecured, what constitutes property of the estate, and whether a creditor holds an allowable claim. "There is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 853 (1986). Federal bankruptcy law incorporates many aspects of state commercial law to discourage forum shopping. *Butner v. United States*, 440

U.S. 48 (1979).[5] The state law aspects of the lease dispute do not prevent this Court from finding that the motions for lease assumption and for relief from the automatic stay involve "public rights."

In both cases in which this Court has held that the dispute in the bankruptcy court was a private right, not a public right, the debtor or trustee pursued actions to augment the bankruptcy estate. *Northern Pipeline* involved a breach of contract action initiated by the debtor to increase the assets available for creditors. *Northern Pipeline*, 458 U.S. at 56. In *Granfinanciera*, the trustee brought an action to set aside a fraudulent conveyance. *Granfinanciera*, 492 U.S. at 36. These actions "more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56. In contrast, Cain Partnership sought to recover the leased premises from the debtor. The debtor was in possession of the property subject to the leasehold estate. The leasehold was the single most valuable asset of the debtor. Pioneer sought to assume the lease as part of its reorganization — a right granted the debtor in 11 U.S.C. § 365. This action was clearly part of the central core of traditional bankruptcy law, not merely a state law contract dispute. Thus, as a public right, the motion for relief from the stay could be adjudicated in a non-Article III forum.

The congressional definition of core proceedings is not so vague as to be unconstitutional. The purpose of the "void for vagueness" doctrine is to ensure fair warning of the effect of a statute and to prevent standardless enforcement. *Kolender v.*

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5. In fact, the Fifth Amendment requires Congress to keep the changes in creditor's rights through bankruptcy laws to a minimum. *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440 (1937).

Lawson, 461 U.S. 352, 357 (1983). The Constitution does not require complete specificity in legislation. *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947). At times the legislature must use general terms in a statute because the various behaviors required or prohibited cannot be described or listed adequately. *Id.* The definition of core proceedings in 11 U.S.C. § 157 is sufficiently definite to give notice as to what actions will be deemed core proceedings and thereby passes constitutional muster.

The Constitution does not prohibit Congress from allowing bankruptcy courts to determine whether a proceeding is core or noncore. Courts often determine their own jurisdiction. *In the Matter of Visioneering Construction*, 661 F.2d 119, 122 (9th Cir. 1981). The decision by the bankruptcy court is appealable. Prior to a decision by the bankruptcy court, a party also has the option of making a motion in district court to withdraw the reference to the bankruptcy court. 28 U.S.C. § 157(d). There is no danger that bankruptcy courts will, by making a determination of their own jurisdiction, extend their jurisdiction beyond permissible limits.

Petitioner's argument that the definition of "core" and/or "public rights" is too nebulous for bankruptcy courts to make a determination on this issue does not bear scrutiny. The same argument could be made for other areas of constitutional law such as personal jurisdiction over nonresident defendants. Though it may be a difficult area of law, lower courts make these determinations daily.

This Court should refuse to grant petitioner's request for a writ of certiorari because there are no constitutional problems with the bankruptcy courts deciding core proceedings under the scheme Congress devised. All other issues presented by the

petitioner are frivolous.[6]

In summary, the Sixth Circuit did not hold that Cain Partnership's motion for relief from the automatic stay and Pioneer's motion to assume the lease were noncore proceedings. The lower courts' holdings that the proceedings were core were not reversed. Thus, the question of whether Cain Partnership consented to the bankruptcy court's jurisdiction should not be properly raised before this Court. Even if that question were before this Court, the Court should refuse to grant the writ because (1) Cain Partnership expressly consented to jurisdiction, and (2) even if there were no express consent, Cain Partnership's consent to a final decision by the bankruptcy court may be implied.

II.

CAIN PARTNERSHIP EXPRESSLY CONSENTED TO THE JURISDICTION OF THE BANKRUPTCY COURT.

Contrary to its assertions on page 7 of the petition, Cain Partnership knew that the bankruptcy court considered the stay relief motion to be a core proceeding before receiving the bankruptcy court's memorandum opinion on the lease dispute.

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6. For example, the fifth and eighth issues presented by petitioner, which concern the alleged inherent challenge to jurisdiction of the bankruptcy court and the takings clause of the Fifth Amendment, are totally without merit. As stated earlier, the Bankruptcy Code allows the bankruptcy judge to extend the deadline for deciding a motion for relief from the stay. 11 U.S.C. § 362(c). Petitioner entered an agreed pretrial order extending the period in which the bankruptcy court had to decide Cain Partnership's motion for relief from the stay (App. A, Petition for Writ of Certiorari). In its motion to lift the stay, Cain Partnership asked the bankruptcy court to order Pioneer to turn over the leased premises (App. A). In support of its stay relief motion, Cain Partnership told the bankruptcy court that it had the authority to grant the relief it sought — turnover of the property (App. B).

In the pretrial order, Cain Partnership expressly agreed that the automatic stay would remain in effect until further orders of the Court "pending a final decision of the Court on the motion of The Cain Partnership, Ltd. to lift the stay." (App. A, Petition for Writ of Certiorari). Moreover, Cain Partnership, in its brief in support of its motion to lift the stay, stated that the bankruptcy court had jurisdiction to decide the matter and, if the court decided in Cain Partnership's favor, to require Pioneer to turn over the leased premises (App. B). In its motion to lift the stay, Cain partnership asked the court to order Pioneer to turn over the property (App. A). Even the cases cited by petitioner as rejecting implied consent to a final decision in a noncore matter by the bankruptcy court agree that parties can expressly consent to the bankruptcy court's entry of a final order. *In re Brickell Investment Corp.*, 922 F.2d 696, 701-02 (11th Cir. 1991); *In re Davis*, 899 F.2d 1136, 1141-42 (11th Cir. 1990); *The Home Insurance Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989). Clearly, Cain Partnership expressly consented to the entry of a final order by the bankruptcy court.

The bankruptcy court's determination of certain noncore disputes related to a bankruptcy case with the consent of the parties does not "impermissibly threaten[ ] the institutional integrity of the Judicial Branch." *Schor*, 478 U.S. at 851. In noncore proceedings, the bankruptcy court acts as an adjunct to the district court. The district court always retains the power to withdraw the reference to the bankruptcy court and to review the bankruptcy court's decision on appeal. 28 U.S.C. § 157. This situation is closely analogous to the Federal Magistrate's Act, approved by this Court in *United States v. Raddatz*, 447 U.S. 667 (1980). Therefore, there is no compelling reason for this Court to grant a writ of certiorari in this case.

III.

CONSENT TO ENTRY OF A FINAL ORDER BY THE BANKRUPTCY COURT IN NONCORE PROCEEDINGS CAN BE IMPLIED.

The circuit courts for the second, sixth and ninth circuits have held that consent to the entry of final orders by the bankruptcy courts in noncore proceedings can be implied. *In re Daniels-Head & Associates*, 819 F.2d 914 (9th Cir. 1987); *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987); *In re Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). Section 157(c)(2) does not require express consent. 28 U.S.C. § 157(c)(2). Moreover, protests over jurisdiction only at the circuit level "more closely resemble[ ] an afterthought than a bona fide objection." *In re Men's Sportswear*, 834 F.2d at 1138. Cain Partnership's failure to object to the entry of a final order by the bankruptcy court even though it had numerous opportunities to do so, should be deemed consent.

Although there may be a split among the circuits regarding whether consent to a final adjudication of a noncore matter by the bankruptcy court may be implied, because of the very clear facts this case is not the proper vehicle for this Court to resolve the conflict. Without a doubt, through the express assertions of Cain Partnership in its motion for stay relief, its brief in support thereof, and its execution of the agreed pretrial order, Cain Partnership expressly consented to the jurisdiction of the bankruptcy court. This Court should not use this case of express consent to make a determination about implied consent.

CONCLUSION

This Court should refuse to grant a writ of certiorari in this case because petitioner has not presented issues required to be resolved by this Court.

Respectfully submitted,

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APPENDIX A — PETITIONER'S MOTION TO LIFT STAY FILED MAY 25, 1989

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CASE NO. 3-89-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession.

MOTION BY THE CAIN PARTNERSHIP, LTD. TO LIFT THE STAY TO PERMIT MOVANT TO REPOSSESS THE PREMISES FORMERLY DEMISED BY THE COLONIAL ENTERPRISES LEASE AND FOR AN ORDER TO REMOVE DEBTOR-IN-POSSESSION FROM SAID PREMISES

COMES NOW The Cain Partnership, Ltd. (hereinafter "the Partnership"), and respectfully moves the court to lift the stay entered by the order of relief pursuant to Title 11, *United States Code* § 362(a) to permit the Partnership to repossess certain real property hereinafter described and to order Debtor to turnover said property to the Partnership.

FOR CAUSE the Partnership would show that the Partnership is the former landlord of debtor-in-possession (hereinafter "Debtor") with respect to the 93.85 acres of the 95.5 acres more particularly described in that certain lease (hereinafter "**the Lease**"), attached as **Exhibit A** hereto, signed between the Partnership and Colonial Enterprises, Inc. (hereinafter "Colonial") on April 11, 1974.

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FOR FURTHER CAUSE, the Partnership would show that, on April 1, 1977, the Lease was amended (Knox County Register's Office, Book 1771, Pages 836-840: Instrument No. 16500) to grant Colonial an additional 55 years of renewal options and, as consideration for the extended option period, Colonial conveyed to the Partnership the Colonial leasehold on 1.65 acres (now Parcel 29.01 on Map 132) of the 95.5 acres which reduced the premises demised by the Lease to Colonial to 93.85 acres (hereinafter "the demised premises").

FOR FURTHER CAUSE, the Partnership would show that Debtor claims that, by a document entitled "Assignment of Lease" (Knox County Register's Office Book 2094 Pages 077-078), the leasehold of Colonial with respect to 5.71 acres (now Parcel 29.04 on Map 132) of the 95.5 acres originally demised by the Lease was transferred by assignment by Colonial to persons other than Premiere Investment Properties, Inc. (the Debtor's predecessor and assignor to Debtor, as assignee) so that, according to Debtor's claim, the premise demised to Debtor by the Lease was made up of approximately 88.14 acres [i.e., 95.5 - (1.65 + 5.71) = 88.14]; however, the aforesaid "Assignment of Lease" is nothing, at most, more than a misnomered sublease, did not remove from the premises currently demised by the Lease any acres, and Debtor remained, until the Lease terminated, obligated to pay the taxes and perform other obligations of the Lease and common law with respect to the 93.85 acres, including the 5.71 acres of Parcel 29.04, demised to Debtor by the Lease.

FOR FURTHER CAUSE, the Partnership would show that Debtor now is in possession of the demised premises (93.85 acres).

FOR FURTHER CAUSE, the Partnership would show that the leasehold evidenced by the Lease is not "property," as defined

in Title 11, *United States Code* § 541(b)(2), of Debtor's estate and that the Partnership has exclusive right of possession to the demised premises.

FOR FURTHER CAUSE, the Partnership would show that Debtor has succeeded to the interest of Colonial in the Lease (Exhibit A hereto) by virtue of an an assignment from Premiere Investment Properties, Inc. (hereinafter "PIP") and a sublessee of PIP (Premiere Development Properties I, Inc.) in April 1987.

FOR FURTHER CAUSE, the Partnership would show that, aside from the April 1, 1977 amendment extending options to renew in exchange for Colonial's leasehold on 1.65 acres (Parcel 19.04 Map 132) of the 95.5 acres originally demised, there have never been any changes in the obligation of the Partnership, to Colonial nor any assignee which holds through Colonial nor in the obligations of Colonial nor any assignee holding leasehold rights from or through Colonial to the Partnership; therefore, the terms stated in the Lease (Exhibit A hereto) are now, and, at all times since the inception of the Lease (Exhibit A hereto), have remained the same; therefore, Debtor, since stepping into the shoes of Colonial by virtue of the assignment from PIP and Premiere Development Properties I, Inc. in April 1987, continuously and uninterruptedly, has been bound to perform all of the obligations undertaken by Colonial on April 11, 1974.

FOR FURTHER CAUSE, the Partnership would show that the explicit terms of the Lease (Exhibit A hereto), continuously and uninterruptedly, have required Debtor, since assuming the obligations of Colonial under the Lease (Exhibit A hereto), to promptly pay when due all real property taxes on the demised premises.

Appendix A

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto) does not require the Partnership to provide Colonial (nor, therefore, any assignee holding leasehold rights and obligations of Colonial) notice of a default nor does the Lease (Exhibit A hereto) require either that an event of default persist for any specified period of time in order to terminate the leasehold of Colonial (and, therefore, any assignee holding the leasehold rights and obligations of Colonial) under the Lease.

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto), in pertinent part, provides as follows:

> THIS LEASE [Exhibit A hereto], made and entered into this 11th day of April, 1974, . . ., That for and in **consideration of** the covenants and **conditions herein contained,** ***to be kept and performed*** **by the Lessee** [Colonial],; the Lessor [the Partnership] does hereby let, grant and lease . . . .
>
> * * *
>
> To have and to hold the aforesaid premises unto the Lessee for the term aforesaid, **subject to the terms and conditions** stated herein.
>
> * * *
>
> **As** further **consideration** for said Lease [Exhibit A hereto], and in addition to the monthly payment provided for herein, the **Lessee shall pay all real property taxes** assessed against said property by taxing authorities during the term of this lease and

Appendix A

any renewal thereof. Said taxes shall be paid ***promptly when due*** during the entire term.

* * *

The following **additional conditions** and stipulations are hereby declared to be a part of this lease [Exhibit A hereto], for the performance of which the parties hereto bind themselves:

* * *

5. Should the Lessor be forced to undertake legal action to enforce its rights upon the breach of the obligations of this lease [Exhibit A hereto], then the **Lessee agrees to pay** the Lessor's reasonable **attorney's fees.**

FOR FURTHER CAUSE, the Partnership would show that, from its inception until its termination, the Lease was a nonresidential lease, i.e., a commercial ground lease of real property for none but commercial use.

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to the City of Knoxville, Tennessee $1,660.29 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to the City of Knoxville, Tennessee $36,239.34 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

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FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to Knox County, Tennessee, $1,347.76 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to Knox County, Tennessee $7,416.08 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to the City of Knoxville, Tennessee $6,092.80 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to the City of Knoxville, Tennessee $16,432.63 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to Knox County, Tennessee $4,945.92 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to Knox County, Tennessee $5,214.72 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to the City of Knoxville, Tennessee $681.92 in real property taxes for that portion of the

demised premises known as Parcel **02903** (see **Exhibit D** hereto).

FOR FURTHER CAUSE, the Partnership would show that the real property taxes more particularly described in the nine immediately preceding paragraphs hereof were required by the Lease to be paid "promptly" on the date "when due" by Debtor; yet, Debtor did not pay said real property taxes "promptly" and "when due" or at any other time thereafter.

FOR FURTHER CAUSE, the Partnership would show that the total amount of real property tax, above specified, if it had been paid by Debtor when due, was $80,031.46.

FOR FURTHER CAUSE, the Partnership would show that, upon becoming delinquent, the above-specified property taxes, to be satisfied, required the payment of interest, which accrues and accumulates daily, and, in some cases, assessment of attorney's fees and court costs.

FOR FURTHER CAUSE, the Partnership would show that failure to pay the above-stated real property taxes, when due, creates on the demised premises a tax lien or the possibility of a tax lien which encumbers and subjects the real property to the possibility of forfeiture by the taxing authorities to satisfy the taxes.

FOR FURTHER CAUSE, the Partnership would show that, in order to liquidate the total indebtedness for past due real property taxes, interest and attorneys fees and, thereby, to remove tax liens or the possibility of same and subjection of the demised premises to forfeiture, on May 2, 1989, the Partnership paid ($67,673.05 to the City of Knoxville, Tennessee and $21,588.31 to Knox County, Tennessee) the total sum of $89,261.36.

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FOR FURTHER CAUSE, the Partnership would show that continuously, since October 2, 1987, the Lease (Exhibit A hereto) has been terminated because of the failure of Debtor to abide by its contractual promise to pay real property taxes promptly, when due.

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto) provides as follows in enumerated paragraph 1 on page 3:

> This lease may be assigned or the leased premises may be sublet in whole or in part **for any lawful purpose** at the will of the Lessee.

And continuing as follows in enumerated paragraph 3 on page 4:

> The Lessee agrees that its use of the leased premises will **not violate any statute or ordinance,** municipal, state or federal.

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto) is terminated because part of the demised premises has been, for an extended period of time, continuously used for an unlawful purpose and in violation of statutes of the State of Tennessee.

Respectfully Submitted,

LARRY E. PARRISH, P.C.,
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Partnership, Ltd.

Appendix A

s/ Larry E. Parrish
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

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Appendix A

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by placing a copy of same in the U.S. Mail, postage prepaid, this 24th day of May 1989.

s/ Larry E. Parrish

APPENDIX B — PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION TO LIFT STAY FILED MAY 25, 1989

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CASE NO. 389-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession.

MOTION OF THE CAIN PARTNERSHIP, LTD. IN SUPPORT OF ITS MOTION TO LIFT THE STAY TO PERMIT MOVANT TO REPOSSESS THE PREMISES FORMERLY DEMISED BY THE COLONIAL ENTERPRISES LEASE AND FOR AN ORDER TO REMOVE DEBTOR-IN-POSSESSION FROM SAID PREMISES

PREFACE

The issue created by the "Motion To Lift The Stay To Permit Movant To Repossess The Premises Formerly Demised By The Colonial Enterprises Lease And For An Order To Remove Debtor-In-Possession From Said Premises" (herinafter "Partnership's Motion") is simple to state, and there exists conclusive authority resolving the issue. The **issue is:** Did the April 11, 1974 lease, as amended, between The Cain Partnership, Ltd. and Colonial Enterprises, Inc. (hereinafter "the Lease") terminate prior to the date (April 12, 1989) on which Debtor filed its petition for relief in the instant case?

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If, as The Cain Partnership, Ltd. (hereinafter "the Partnership") contends, the posited question must be answered in the affirmative, the former leasehold represented by the Lease, to which Debtor was the assignee, is not property of the bankruptcy estate of Debtor. If, as the Partnership also contends, the former leasehold is not property of Debtor's estate, the automatic stay pursuant to Title 11, *United States Code* § 362(a) does not bar the Partnership from regaining possession.

A subsidiary issue involves whether this court has jurisdiction to require Debtor to turn over the formerly demised premises to the Partnership. It is the contention of the Partnership that the court has sufficient jurisdiction over Debtor to require the turnover and that exercise of that jurisdiction is appropriate under the circumstances.

STATUS OF CASE

On April 12, 1989, Pioneer Investment Services Company, Debtor-In-Possession (hereinafter "Debtor") voluntarily filed a Petition for Relief in the instant case. Concomitantly therewith, the automatic stay mandated by Title 11, *United States Code* § 362(a) became effective enjoining claims against or to the estate of Debtor.

The Partnership's Motion, which this memorandum supports, sets out the facts which the Partnership is prepared to prove. To repeat those facts here would be duplicitous. Therefore, the factual presuppositions underlying the remainder of this memorandum are those which appear in and as a part of the Partnership's Motion.

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PROCEDURAL APPROPRIATENESS OF INSTANT MOTION

At first blush, there might appear to be a logical inconsistency in the contention by the Partnership that, at the same time, the Lease is not "property" of the estate which is protected by the § 362 automatic stay and that the court should lift the § 362 automatic stay in order to allow the Partnership to obtain possession of it. However, the breadth and penal nature of the automatic stay requires the present procedure. The Partnership is enjoined by the § 362 stay from even giving notice to Debtor to remove itself from the demised premises. This subject has been addressed by case authority in the past.

In particular, the following language is instructive as it appears in *In re: Pagoda International, Inc., Debtor,* 26 B.R. 18 (Bankr. D.Md. 1982) at 20:

> Thus, as pointed out by Pagoda in its brief, it does have a scintilla of equitable interest in the premises. *In Re Andorra Meat Market, Inc.,* 7 B.R. 744, 746 (B.E.D. Pa. 1980). It is this scintilla of interest that triggered the protection of § 362(a). Having the protection in place, it then became incumbent upon the landlord, as it did here, to proceed with this action. *In Re Lewis,* 15 B.R. 643 (B.E.D.Pa. 1981). The situation is not unlike that discussed by Judge Kahn in *Matter of Mimi's of Atlanta, Inc.,* 5 B.R. 623, 627 (B.N.D.Ga. 1980). There, the court noted that even though the leases had been terminated the debtors had a **tenancy by sufferance**.

Bankruptcy Judge William Houston Brown recently

recognized that Tennessee law, likewise, considers such a tenant to be a tenant at sufferance, saying so in *In Re: Memphis-Friday's Associates, Debtor,* 88 B.R. 830 (Bankr. W.D.Tenn. 1988) at 837:

> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. . . . [I]n fact, it has been held that where a lessee remains in possession following default and consequent termination of the lease, the lessee is a **"tenant at sufferance"** of the lessor. *See,* e.g., *In re Maxwell,* 40 B.R. 231, 237 (Bankr. N.D.Ill. 1984); *Metropolitan Life Ins. Co. v. Moore,* 167 Tenn. 620, 72 S.W.2d 1050, 1051 (1934).

Reference directly to the opinion in *Metropolitan Life Ins. Co. v. Moore, supra,* further establishes the proposition saying as follows in 167 Tenn. at 624:

> At common law a mortgagor holding possession "after condition broken" is a "tenant at sufferance" of the mortgagee, according to *Underhill on Landlord and Tenant,* sec. 167; *Fuller v. Wadsworth,* 24 N.C. (2 Ired), 263, 38 Am.Dec., 692; *Ford v. Steele,* 54 Vt., 562.

For more detail with respect to the parameters of rights of a tenant at sufferance is available in 51 C.J.S., *Landlord and Tenant,* p. 779, § 175 et seq. and by reference to the discussion in *Knight v. Haley,* 176 A. 461, 464 (Del. 1934).

One distinction with respect to a tenant at sufferance is that one occupying leased premises as such has neither a legal nor an

equitable interest in the demised premises. *Hughes v. Monnahan,* 282 Minn. 407, 165 N.W.2d 231, 233 (1969). The fact that a debtor which is a tenant at sufferance possesses no interest in the occupied premises which is of any benefit to any creditor of debtor is indicated by the following language from *In re Pagoda International Inc., Debtor, supra,* 26 B.R. at 20:

> The fact that the state processes have not been completed as to Pagoda does not mean that any interest is left other than the common law tenancy at sufferance. In fact, it is not a tenancy, but **permissive occupation.** It **is inalienable** by Pagoda.

In the context of discussing the inalienability of the rights of one tenant by the entirety in Tennessee, this court, twice previously, has found occasion to recognize that whatever interest a debtor in bankruptcy has as a mere tenant by the entirety is inalienable and, because of this, that interest is not part of the bankruptcy estate. *In re Garretson,* 6 B.R. 127 (Bankr. E.D.Tenn. 1980); *In re Dawson,* Debtor, 10 B.R. 680 (Bankr. E.D.Tenn. 1980).

In bankruptcy, the issue of what a debtor possesses as a tenant at sufferance has been many times discussed, and, each time, the result is the same. While the interest might be enough to initially trigger the protection of a § 362(a) automatic stay, it is not enough to allow the right which initially enabled the debtor to occupy previously demised premises to be considered "property" of the bankruptcy estate. *David L. Trask, Trustee in Bankruptcy of Magic Spuds, Inc.,* 376 F.2d 17, 20, 21 (5th Cir. 1967); *In re Maxwell, Jr., Debtor,* 40 B.R. 231, 236, 237, 238 (Bankr. N.D. Ill. 1984); *In re Masterworks, Inc., Debtor,* 94 B.R. 262, 265, 266, 267 (Bankr. D.Conn., 1989); *In re M & R Apparel, Inc.,*

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Debtor, 92 B.R. 565, 568, 569 (Bankr. D. Conn 1988); *In re Memphis-Friday's Associates,* 88 B.R. 830, 837, 840, 841, 842, 843 (Bankr. W.D. Tenn. 1988); *In re Ahrens, Debtors,* 64 B.R. 5, 6, 7 (Bankr. E.D.Pa. 1986); *In re Black, Debtor,* 58 B.R. 60, 61, 62 (Bankr. E.D.Pa., 1986); *In the Matter of: Condominium Administrative Services, Inc., Debtor(s),* 55 B.R. 792, 795, 796, 797, 798, 799 (Bankr. M.D.Fla. 1985); *In re Players' Pub, Inc., Debtor,* 45 H.R. 387, 391, 392, 393 (Bankr. D.Mass. 1985); *In re Gray, Debtors,* 37 B.R. 532, 535, 536, 537 (Bankr. N.D.Ga. 1984); *In re Doan's Truck Repair, Inc., Debtor,* 34 B.R. 180, 183) (Bankr. D.Wy. 1983); *In re Foxfire Inn of Stuart Florida, Debtor,* 30 B.R. 30, 31, 32 (Bankr. S.D.Fla. 1983); *In re Pagoda International, Inc., Debtor,* 26 B.R. 18, 20, 21, 22 (Bankr. D.Md. 1982); *Executive Square Office Building v. O'Connor And Associates, Inc.,* 19 B.R. 143, 146, 147, 148, 149 (Bankr. N.D.Fla. 1981); *In re Victory Pipe Craftsmen, Inc., Debtor,* 8 B.R. 635, 636, 637 (Bankr. N.D.Ill., E.D. 1981).

It is generally held that a tenant at sufferance, as a permissive occupant of formerly demised property, has no further entitlement to permissive occupancy after receiving notice from the owner to turnover. In the instant case, the Partnership did not give notice prior to the April 12, 1989 filing of the petition in this case. However, on the present state of the record, the Partnership is automatically enjoined from giving such a notice. But, it is generally conceded that the filing a public proceeding with service on a party to the proceeding is considered notice. Therefore, the Partnership's Motion, under any scheme of things, constitutes permissible notice to Debtor.

Hyper-technicality might dictate that the Partnership be given partial release from the automatic stay to give Debtor notice to quit the formerly demised premises. If Debtor refused to heed

the notice, the Partnership might be required to come back to this court to seek a further partial lifting of the automatic stay to allow the Partnership to commence state court proceedings to oust Debtor. Such a process might be subject to classification as form over substance.

In order for this court to determine whether any lifting of the stay, in response to the Partnership's Motion, is appropriate, it will have to determine whether or not the Lease terminated prior to April 12, 1989, the filing date of Debtor's Chapter 11 petition. That is, if the Lease did not terminate, it constitutes an unexpired lease which Debtor is entitled to affirm or reject provided certain other conditions are met.

Because the Lease will probably constitute a substantial portion of the value reported as property by Debtor, to refer the matter to state court to be resolved, in essence, would amount to turning this entire case over to General Sessions. If this court determined that the Lease was terminated prior to April 12, 1989, for this court to refer the matter to state court for eviction proceedings, likewise, might seem to catapult form over substance. The state court would be bound by the law of the case with respect to the issue of termination and would have nothing more to do than issue writs and occupy the time of the Sheriff when the same might more simply be accomplished by this court.

STATUTORY PROVISIONS IMPLICATED

In pertinent part, Title 11, *United States Code* § 362 provides as follows:

> (a). . . . [a] petition filed . . . operates as a stay, applicable to all entities of —

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* * *

(3) any act to obtain possession of . . . property of the estate or of property from the estate or to exercise control over property of the estate;

* * *

(c) . . . (1) the **stay** of an act against property of the estate under subsection (a) of this section **continues until** such property is no longer property of the estate;

* * *

(d) On request of a party in interest and after notice and a hearing, the **court shall grant relief from the stay** provided under subsection (a) of this section, such as by terminating, . . . such stay- . . . (2) with respect to a stay of an act against property under subsection (a) of this section, **if** — (A) the **debtor does not have an equity** in such property; . . . .

In pertinent part, Title 11, *United States Code* § 365(c) states as follows:

The trustee **may not assume** . . . any . . . unexpired **lease** of the debtor, . . ., **if** — . . . (3) such lease is of nonresidential real property and has been **terminated** under applicable nonbankruptcy law **prior to the order for relief.**

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In pertinent part, Title 11, United States Code § 541(b)(2) states as follows:

> Property of the estate does not include — . . . (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under the lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

GOVERNING CASELAW

There are certain governing rules which are universally accepted and which have present application so that mere statement of them is here sufficient. These rules are recognized in an article entitled "The Postpetition, Pre-Rejection, Pre-Assumption Status of An Executory Contract" which appears in 59 *American Bankruptcy Law Journal* 197 (1985). Quotation of the rule with which the Partnership's Motion is most concerned might be helpful. This appears in 59 ABLJ at 201:

> (1) *May the DIP resurrect an executory contract that terminated prior to the filing of the Chapter 11 petition?* (emphasis in original)
>
> * * *
>
> To this question the answer is clearly no. The DIP may not reinstate, revive, or otherwise resurrect a contractual relationship that in fact ended prior

to the date of the filing. In such a case, there is no executory contract for the debtor to assume or reject.[19]

* * *

19. *See*, e.g., *In re Triangle Laboratories, Inc.*, 663 P.2d 463, 467-468 (3rd Cir. 1981) ("An executory contract or lease validly terminated prior to the institution of bankruptcy proceedings is not resurrected by the filing of the petition in bankruptcy, and cannot therefore be included among the debtor's assets."); *In re New Media Irjax, Inc.*, 19 Bankr. 199, 201 (Bankr. M.D.Fla. 1982) ("If the executory contract was effectively cancelled prior to the intervention of bankruptcy, there remains nothing for the Debtor to assume."); *In re Benrus Watch Co. Inc.*, 13 Bankr. 331, 334 (Bankr. S.D.N.Y. 1981) ("Contracts that have been effectively terminated prior to the filing of a chapter 11 petition cannot be revived by the bankruptcy court.").

Whether the contract which the DIP seeks to assume or reject actually expired prior to the date of filing is generally a question of state law, a point recognized by most courts.[20]

* * *

20. *See, Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1212 (7th Cir.), *cert. denied* 105 S.Ct.386 (1984): ("If a contract has been terminated pre-

> bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law.") *See also In re Bricker*, 43 Bankr. 344 (Bankr. D. Ariz. 1984).

In recent cases, Judge Lundin has commendably analyzed at what point, under Tennessee law, a **residential** lease expires under the Bankruptcy Code. Of course, an unexpired residential lease is specially protected by Title 11, *United States Code* § 362(b)(10). Under § 362(b)(10), a residential lease can be assumed by a debtor unless, pre-petition, the residential lease has **"expired."**

This is in contrast to the Bankruptcy Code provision with respect to nonresidential real property leases. With respect to **nonresidential** leases, a debtor is prohibited from assuming the benefits or obligations of such a lease if, pre-petition, the lease had **"terminated."** *See* Title 11, *United States Code* § 365(c)(3). Thus, an unexpired, but terminated, nonresidential lease cannot be assumed, post-petition, by a debtor.

Judge Lundin exhaustively concludes that a lease of residential property cannot be considered "expired" under Tennessee law until after execution of a Writ of Possession. *In re Talley*, 69 B.R. 219 (Bankr. M.D.Tenn. 1986); *In re Goodloe*, 61 B.R. 1016 (Bankr. M.D.Tenn. 1986). Of particular interest are the following words of Judge Lundin, quoted from *In re Talley, supra*, 69 B.R. at 223:

> It is doubtful that Congress intended to allow debtors to contract away trustee's power of

> assumption through a lease term which equates a default with "termination." **"Termination," "default" and "expired" are not coextensive;** to allow full equation would thwart the Congressional intent that trustees (and Chapter 13 debtors) may cure defaults for the benefit of the estate pursuant to § 365.

More recently, Bankruptcy Judge Brown has, with equal thoroughness as Judge Lundin, considered when, under Tennessee law, a nonresidential (commercial) lease is "terminated" for the purposes of Title 11, *United States Code* § 365(c)(3). *In re Memphis-Friday's Associates, supra.*

The *Memphis-Friday's* case involved a commercial lease of a restaurant. The debtor attempted to assume the lease after its Chapter 11 petition was filed. The landlord objected and based its objection on the contention that the lease terminated pre-petition. In support of its contention, the landlord established that, pre-petition, landlord gave debtor written notice dated April 18, 1988 that its lease would terminate on April 30, 1988 "due to debtors noncompliance with terms of the written lease." The lease provided a five day cure period for cure on non-payment of rent and a 10 day cure period for other breaches. However, though it was not discussed in the opinion, some of the breached (e.g., failing to obtain permission of the landlord before making repairs) were incurable. By way of background the court stated as follows in the *Memphis-Friday's* case:

> The undisputed evidence in the instant proceeding establishes that the Debtor **closed** its operation and commenced renovations at the restaurant on January 18, 1988. The renovations were

undertaken pursuant to a provision in the Debtor's modified franchise agreement with Friday's, Inc. that it would take steps necessary to conform its restaurant operation to the standards required by the franchisor. . . . At closing, the estimated time for completion of the renovations was two months, while the estimated cost was $250,000.00. The **Debtor failed to satisfy the lease** requirements **that it obtain permission** for renovations from the landlord, provide the landlord with specifications for the work to be done, and submit to the landlord performance and labor and material payment bonds or financial statements exhibiting a sufficient net worth of the Debtor, (citations omitted) . . . [t]he landlord sent notice of such failure, ... (citations omitted) Additionally, on March 1, 1988, the Debtor failed to make its rental payment for that month. Notice . . . with instructions to cure same, was sent and received, via certified mail, on March 16, 1988. (citations omitted)

On March 17, 1988, the Tennessee Department of Employment Security filed a lien against the Debtor's property . . . . (citations omitted) [c]ontractor performing the renovations . . . filed a materialmen's lien . . . . (citations omitted). [T]hese liens are alleged to be in further contravention of the lease.

On April 12, 1988, the Debtor again failed to pay its monthly rental and on April 18, 1988, the landlord sent the Debtor the "notice of Termination and Notice of Additional Defaults"

via certified mail. The notice specifies the above defaults and provides that in light thereof, the "Lease and Term thereof will terminate on April 30, 1988." (citations omitted).

Mr. Victor, an officer of the Debtor, Maruki Tennessee "F," Inc. and of Maruki U.S.A. Co. Inc. testified that he attempted several times to cure the defaults by proposing settlement offers but that the landlord "would not let him pay."

* * *

The equities do not favor this Debtor, . . . [T]he bankruptcy court is a court of equity. *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). 'It is, however, a court of equity under the law.' *In re Costell*, 75 B.R. 348, 353 (Bankr. N.D. Ohio 1987). The equity of the court does not reach to this Debtor, especially in view of the mandate of the Code. 11 U.S.C. Section 365(c)(3). As Justice White recently observed for the unanimous court in *Northwest Bank Worthington v. Ahlers*, 108 S. Ct. 963, 968-969 (1988): **'[w]hatever equitable powers remain in the bankruptcy courts must and can only he exercised within the confines of the Bankruptcy Code.'**

* * *

[T]he court concludes that the newer, specific Section 365(c)(3) governs over the older, more general Section 108(b). 'It is a well established

> maxim of statutory interpretation that when Sections of an act can be construed consonantly, the should be so interpreted.' *I.T.T. Small Business Finance Corp. v. Frederigue*, 82 B.R. 4, 6 (E.D. N.Y. 1987), citing, *Sutherland Stat. Const.* Sections 51.01, 51.02 (4th Ed.). However, a consonant reading may not always be possible. In *Bank of Commonwealth v. Bevan*, 13 B.R. 989 (E.D. MI. 1981), the District Court construed Section 108(b) to be more specific than Section 362(a) and thus Section 108(b) limited the automatic stay in that case. Id. at 994. However, in the case of Memphis-Friday's Section 365(c)(3) is more specific and limiting than Section 108(b). In *In re Eldorado, Inc.*, 85 B.R. 555, 557 (Bankr. D. Mont. 1987), the court reasoned that Section 108(b) did not act to extend time for curing of pre-bankruptcy defaults in executionary contracts. This is consistent with the Seventh Circuit in *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215 (7th Cir. 1984), *cert denied*, 469 U.S. 982, 105 S.Ct. 386. As the *Moody* court observed: 'Section 365 specifically governs the time for curing defaults in executionary contracts, and thus, it controls here.

In the *Memphis-Friday's* case, Judge Brown found that the nonresidential lease there in question was terminated prior to the time when the debtor filed its Chapter 11 petition. Because the enunciation of Tennessee law by Judge Brown is definitive, with respect to the issue at hand, extensive quotation seems appropriate. Particularly, it is said as follows in *In re Memphis-Friday's Associates, supra*, 88 B.R. at 836-837:

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It is argued by the Debtor that, notwithstanding the above events, the lease has not been properly terminated under Tennessee law because termination requires actual re-entry by the landlord, commencement of a suit for possession, or issuance of a writ of possession. For this proposition, the Debtor cites the court to [citations omitted].

Each of these cases is readily distinguishable from the proceeding at bar in the first instance because they involve residential real estate. Unlike the proceeding sub judice, the cases cited by the Debtor involve a determination of when a debtor's leasehold or freehold interest in residential real estate is "expired" or "forfeited" rather than a determination of **when a non-residential lease is "terminated"** for purposes of Section 365(c). Accordingly, these cases stand for the proposition that a freehold interest is not forfeited prior to a foreclosure sale and that a lease is not "expired" prior to the issuance of a writ of possession pursuant to Tennessee law and when, for purposes of Section 365(a) of the *Bankruptcy Code*, the subject property is residential [citations omitted].

* * *

This line of reasoning was reiterated in the 1986 Pizza Pumps of America case, *supra*. There, the Tennessee Court of Appeals was faced with a commercial **lease** which **provided** that **no notice** of default **or opportunity to cure** was required for

> the lessor to treat the lease as forfeited when rental payments were overdue. The Court held that the lease was to be construed as written and as such, the **lessee had "lost all legal interest in the lease by forfeiture in not paying the rent on time."** (citation omitted)
>
> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. In addition, these cases clearly illustrate that a commercial lease may be **terminated** by the lessor **regardless of possession.**
>
> * * *
>
> In order to fully assess Debtor's rights under the Code, the court has considered whether the Debtor has complied with Section 365(b)(1). (footnote omitted) To reach this consideration, the court would be required to find that an unexpired lease existed for assumption by the Debtor, and **the court has found and concluded that there is no lease for assumption.**

Reference to *Pizza Pumps of America Inc. v. Krispy Kreme Doughnut Corporation, et al.*, 11 TAM 52-13 (Tenn.App., W.S., October 31, 1986), a copy of which is attached hereto, is helpful. For instance, the Court of Appeals stated as follows:

> Pizza Pumps filed its complaint alleging breach of contract and wrongful eviction on May 23, 1984. The Chancellor dismissed the complaint, and

awarded Krispy Kreme arrearages in rent and taxes, attorney's fees and costs on its countercomplaint.

The essential dispute between the parties is whether the lease, . . ., required that notice of default and opportunity to cure within thirty days be granted when rental payments were overdue. Krispy Kreme interprets the **lease** as allowing **no grace period to cure** a default from non-payment of rent, while **Pizza Pumps insists that it complied in good faith** with the terms of paragraph 15 in **tendering payment to cure.**

* * *

We find that this provision makes it clear that overdue rental payments cannot be extended by granting thirty days to remedy, absent the express written consent of the lessor.

* * *

We **do not doubt** that Vella, the president of **Pizza Pumps, subjectively interpreted the lease in this manner;** however, the written terms of the lease must control: in the absence of fraud or mistake, a contract must be interpreted and enforced as written **even though** it contains terms which may be thought **harsh and unjust.** *Ballard v. North American Life & Casualty Co.*, 667 S.W.2d 79, 82 (Tenn. App. 1983).

* * *

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> **We hold** that the written language of paragraph 15, taken as a whole, must be construed to mean that **no notice** of default **and opportunity to cure is required** when rental payments are overdue. Therefore, the lessor could properly choose its option of treating the lease as forfeited, null, and void upon failure to **pay** rent installments **when due.**
>
> Pizza Pumps urges that **estoppel** by course of dealing, i.e., **by accepting late rental payments in the past,** should prevent Krispy Kreme from revoking its leasehold rights. However, our construction of the lease makes it apparent that Pizza Pumps **lost all legal interest in the lease by forfeiture in not *paying* the rent *on time.*** **Estoppel** may be urged to protect a right, but it **can never create a right.** *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 71 S.W.2d 683, 684 (1934). (emphasis added)

The rule articulated in the *Memphis-Friday's* case and in the *Pizza Pumps* case is not without historical underpinning. To the contrary, though Judge Brown and Judge Highers found it unnecessary in opinions in *Memphis-Friday's* and *Pizza Pumps* to trace the historical roots dictating the results reached with respect to when the lessees under those commercial leases lost all legal rights deriving from the subject leases, what resulted was simply application of plain vanilla law longstanding and entrenched in Tennessee. The essence of the *Memphis-Friday's* and the *Pizza Pumps* rulings is that a commercial lease is nothing more and nothing less than a contract between the lessor and the lessee. The courts took note of the fact that there were no statutory

provisions which gave special protections to such (non-residential) lease/contracts. Also, at least by implication, the courts essentially proceeded on the assumption that there was no disparity in bargaining power at the inception of the commercial leases which required evening-up in order for the law to provide equal footing to the contracting parties. Therefore, the courts, in *Memphis-Friday's* and *Pizza Pumps*, essentially, applied standard common law contract principles as the means by which to resolve the disputes.

One of those standard common law contract doctrines is known as the first breach. A recent and succinct statement of the rule may be found in *Sage of America Company v. Lucey Boiler Company,* TAM ____ (Tenn.App. W.S. October 9, 1987) perm. app. den. January 25, 1988, where the court states as follows in its slip opinion:

> A party who is determined to be in material breach of a contract has no right to rely on the contract terms. The non-breaching party has no further obligation to perform. (citations omitted). Gerep was therefore justified in terminating the contract.

There could hardly be a more indisputable, universally applicable (at least in Tennessee) and clear rule of law than that, when one party to a contract breaches the terms of the contract, the contract ends. The only thing left, thereafter, is for the parties to the contract to either disengage their affairs and any property theretofore encumbered by the contract or for the parties to make a new decision to continue the relationship created by the contract, which, even if continued precisely as it had been before the termination, in effect, is a new contract made just like the one which was in force previous to termination. *Cummins v. McCoy,*

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22 Tenn.App. 681, 691, 125 S.W.2d 509 (1938); *Santa Barbara Capital Corp. v. World Christian Radio Foundation, Inc.*, 491 S.W.2d 852, 857 (Tenn.App. 1972), *cert denied* March 19, 1973; *W.F. Holt Company v. A & E Electric Company, Inc.*, 665 S.W.2d 772, 730 (Tenn.App. 1983) perm. app. den. January 30, 1984; *Misco, Inc. v. United States Steel Corporation*, 784 F.2d 198, 202 n.2 (6th Cir. 1986); *Mr. Transmission, Div. of International Transtech Corporation v. Yount*, 13 TAM 29-14, 1988 Tenn.App.LEXIS 297 (Tenn.App. May 27, 1988); *Almany v. Nationwide Insurance Co.*, 12 TAM 10-6 (Tenn.App. M.S. January 29, 1987); 17 *AmJur2d* Contracts § 365 p. 807 and 17 *AmJur2d Supp.* pp. 222-223; *Restatement (Second) Contracts* § 237, § 241 (1979). The result reached in *Memphis-Friday's* and *Pizza Pumps* is nothing more than an undazzled application of a rule which is beyond dispute either on the oughtness or the existence level.

There are contracts with specific terms which, when the first breach rule is applied to them, yield a different result than when the same rule is applied to contracts without such provisions. That is, if a contract has as a part of it stated means by which the parties must terminate the contract, the explicit prerequisites of the contract will displace the common law rule which, as a matter of law, terminates the contract upon first breach. For instance, if a contract has a cure provision which requires a stated amount of advanced notice to provide an opportunity for the breaching party to cure the breach, the breach by the breaching party will not terminate the contract. Instead, the contract can be terminated only by the means explicitly set out in the contract. In such contracts, the breach by one party normally effectuates the termination provision and gives opportunity for the non-breaching party to set in motion the termination process; however, the termination itself cannot occur by a mere breach. But, the fact

that the first breach rule has an effect on contracts with provisions setting out the means of termination different from its effect on contracts with such provisions does not lessen the force of the first breach rule when applied to contracts without such explicit terms. *Micro Craft, Inc. v. Jones-Robertson, Inc.*, 10 TAM 14-8 (Tenn.App., W.S. Sitting at Nashville, March 6, 1985).

The Lease has no explicit provisions governing its termination. There is no advance notice requirement nor is there any other opportunity provided for either party to cure a breach. Therefore, termination is effectuated by the explicit common law governing termination of contracts where no explicit contract provision sets out the means by which termination must occur.

In the case of *In re Studebaker's of Fort Lauderdale Ltd.*, 73 B.R. 217 (Bankr. N.D.Fla. 1987), the court was faced with debtor's argument that it retained an equitable interest in a terminated commercial lease by virtue of its continued possession of the demised premises at the time of filing the petition for relief and that it would amount to an **unjust enrichment** to the landlord to prevent the debtor from assuming the lease post-petition. The words of the court are elucidating as follows in *In re Studebaker's of Fort Lauderdale Ltd., supra*, 73 B.R. at 218-220:

> The **debtor, . . ., asserts** that it has an equitable right to possession of the subject premises; that **due to the debtor's improvements of said property, the landlord will be unjustly enriched** if allowed to remain in possession; and that it is ready, willing, and able to tender the full amount owed on the rent arrearage, plus interest, costs, and attorney's fees to the landlord herein . . . . The landlord contests said motion, asserting that the

lease was validly terminated pursuant to state law prior to the debtor's filing . . . .

* * *

[m]any courts have ruled that such bare "hold over" possession by the tenant and/or inconclusive proceedings for repossession by the landlord gives the tenant a slight equitable interest which is property of the estate under § 541 and protected by the filing . . . .

* * *

Under § 365 of the Bankruptcy Code, the equitable considerations applied in the **Fontinbleau** [515 F.2d 913 (5th Cir. 1975)] have been **superseded by** specific statutory language addressing the assumption of leases. **§ 365(c)(3)** provides that: . . . . If the *lease* is thus terminated, as opposed to the tenant being dispossessed of the premises, then the trustee is precluded from assuming it. The presence of a slight equitable interest by virtue of possession of premises by a debtor has no bearing whatsoever on the issue of assumability of an unexpired lease. "Once a lease is terminated prior to the intervention of bankruptcy, the landlord-tenant relationship is gone regardless of the right of possession." (citation omitted).

* * *

Accordingly, the debtor had no interest in the lease

or the leasehold premises to be included as property of the estate under § 541 when this case was filed.

LEASE TERMINATION

As quoted on pages 3 and 4 of the Partnership's Motion, the Lease, unequivocally, conditions the right of the lessee to hold the demised premises on the explicitly stated condition that the lessee pay all real property taxes "*promptly when due.*" The Lease has no "ifs," "ands," "buts," or "ors" which in any way provides a caveat or exception with respect to whether or when real property taxes must be paid by the lessee in order for the lessee to preserve its right to hold the premises.

There could be no dispute with respect to the conditionality of the right of the lessee to hold the leased property or that failure to pay the real property taxes *when due* was a breach of the agreed-to condition which the lessee promised the Partnership it would perform at risk of forever losing its right to hold the demised premises.

The Lease has in it not one word which extends to the lessee any right to be notified by the Partnership that it has failed to keep its promise with respect to *promptly* paying the real property taxes *when due.* There are no words of any kind at any place in the Lease from which it could be implied that the Partnership ever undertook the obligation to provide notice to the lessee that, if it failed to keep its promise to pay the real property taxes, *promptly when due,* the Partnership would remind the lessee. Instead, the Partnership and the lessee, in very uncomplicated and abundantly clear language, agreed that the lessee would take full responsibility to pay the real property taxes when due, without prompting by the Partnership, and that the lessee would bear the

full consequences of its failure.

As stated on pages 4, 5 and 6 of the Partnership's Motion, the lessee, in the person of Debtor, allowed over $80,000 in real property taxes to accumulate, due but unpaid, from October 1, 1987 up through and including March 1, 1989.

By May 2, 1989, over $9,000 in interest, court costs and attorney's fees incurred by the taxing authorities in their efforts to collect the due, but unpaid, taxes had accrued and was continuing to accrue on a daily basis. The leased premises were threatened with and encumbered by tax liens because of Debtor's prolonged failure to abide by the condition which it promised to satisfy as an essential prerequisite of its right to possession of the leased premises.

There is no privity of contract between the Partnership and any persons or entities other than Colonial Enterprises, Inc. and its assignees or assignees of its assignees, the latest of which is Debtor. In other words, the Partnership looks to Debtor and to no other person nor entity for payment of the taxes as promised by Colonial Enterprises, Inc.

If persons or entities, in privity with Debtor, have breached agreements obligating such other persons to Debtor with respect to paying taxes, Debtor's remedy for losses suffered because of the termination of the lease is against those obligated to Debtor. None of this alters the fact that the Lease terminated upon failure of the lessee (Debtor) to live up to its promise to pay all real property taxes *promptly when due*. Since the first failure by the lessee (Debtor) to pay real property taxes promptly when due, on October 1, 1987, Debtor has been no more than, at best, a tenant at sufferance of the Partnership. The Partnership intends

to be at sufferance for no longer.

PARCEL 29.04

This section of this Memorandum relates specifically to what is addressed by the second "FOR FURTHER CAUSE" paragraph on page 2 of the Partnership's Motion which this memorandum supports. That is, a 5.71 acre portion of the 95.5 acres originally demised by the Lease (which is now Parcel 29.04 on Map 132) as to which there is (or at least was) a dispute between Debtor and the Partnership with respect to tenancy and occupancy. As stated in the Partnership's Motion, it is the Partnership's position that this 5.71 acres is part of the demised premises occupied and possessed by Debtor. It is (or was) the position of Debtor that this 5.71 acre Parcel 29.04 is not in Debtor's possession because it is not part of the premises demised by the Lease to Debtor. This is presently relevant to the Partnership's Motion because of the Partnership's request that Debtor be ordered to turnover the demised premises.

Debtor is (or at least was) apparently going to resist turnover of that 5.71 acre portion of the demised premises, if for no other reason, on the contention that Debtor did not possess the 5.71 acres to turnover. Dependent on the response of Debtor and other interested persons to the Partnership's Motion, the issue with respect to the 5.71 acres could become germane to an issue as yet not raised and, because this issue might be avoided altogether, it will not be broached here. But, if the issue is subsequently raised, reference back to what is discussed here, because of the turnover issue, will be made.

The Lease has specific language which operates to control whether Debtor possesses the 5.71 acres by virtue of the assignment

from Premiere Investment Properties, Inc. to Debtor of the Colonial leasehold. The language appears succinctly as follows in enumerated paragraph 1 on page 3 of the Lease:

> This lease may be assigned or the leased premises may be sublet in whole or in part . . . .

As noted above, the Lease has never been amended, explicitly or implicitly, at any time which in any way modifies or allows deviation from the obligations imposed on the Partnership's tenant/lessee by the above-quoted words. Furthermore, the Partnership has never ratified or otherwise consented to any tenant/lessee's deviation from the obligations undertaken by the tenant/lessee as a result of the above-quoted words.

From the Partnership's standpoint, the above-quoted words ensure a vitally important arrangement by which the Partnership intended to be related to the demised property. More specifically, the Partnership never intended to have but one tenant/lessee responsible to the Partnership and to whom/which the Partnership could look for performance of all of the terms of the Lease. If the tenant/lessee of the Partnership chose to have one or a hundred and one subtenants, this was a decision left by the Partnership to the Partnership's tenant/lessee; however, no matter what decision the Partnership's tenant/lessee made with respect to subleasing the demised premises, this would in no way impact the fact that the Partnership would continue to have one responsible party, i.e., the Partnership's tenant/lessee.

The above-quoted language from the Lease allows that Partnership's tenant/lessee flexibility to remove itself from the relationship with the Partnership by replacing itself with ***an*** assignee. However, the Partnership's tenant/lessee could never

replace itself with multiple assignees. This would defeat the entire premise of the Lease by forcing the Partnership into direct relationships with more than one tenant/lessee. The Partnership protected itself from such a situation by the explicit above-quoted language in the Lease. **What is assignable is: "This lease."** What may be "sublet in whole or in part" is the "leased premises." However, "this lease" cannot be assigned "in whole or in part."

Attached to this memorandum as Exhibit A is a copy of a document entitled "ASSIGNMENT OF LEASE" entered into, according to what is said on its face, on February 1, 1984 and which is recorded as Instrument No. 293425 in Book 2094 on pages 077 and 078 which purports to transfer the subject 5.71 acres. It is the position of the Partnership that this document, at best, is a sublease from Colonial to Orange Tee, Inc.

The context is worthy of note. In February 1984, Colonial, since the inception of the Lease on December 11, 1974, had been the one and only tenant/lessee of the Partnership. There had been one, and only one, prior amendment (which is the only amendment there ever has been) to the Lease, and it occurred on April 1, 1977 and gave to Colonial 55 years of extended options and transferred from Colonial its leasehold on 1.65 acres of the 95.5 acres of demised premises.

The attached (Exhibit A hereto) "ASSIGNMENT OF LEASES" is signed by Orvis Milner for and as President of Colonial and by Orvis Milner for and as President of Orange Tee, Inc. The Partnership is not a party to the "ASSIGNMENT OF LEASE" nor has the Partnership affixed any seal or signature to it acknowledging or consenting thereto.

The language of the "ASSIGNMENT OF LEASE" is worthy

of direct quote as follows:

> Whereas, the Assignor (Colonial) is legally in the possession of certain property (further description of the 5.71 acres omitted) . . . which has been **sublet to Omie, Inc.**, under agreement dated August 7, 1978 (further description omitted) . . ., and
>
> Whereas, for good and valuable consideration, . . .paid by Assignee (Orange Tee Inc.) to Assignor (Colonial), the **following described property is hereby assigned from Colonial . . . to the Orange Tee, Inc.** who shall hereinafter stand in the stead and place of Assignor (Colonial) and be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 agreement.

Omie, Inc. is not a party to the "ASSIGNMENT OF LEASE" and has not signified any agreement or acquiescence to the document nor its contents. Likewise, Omie, Inc. has never raised any objection; therefore, presumably satisfactory arrangements were made between Omie, Inc. and Orange Tee, Inc. and Colonial.

What Orange Tee, Inc. assumed (i.e., "the following described property") is the sublease from Colonial to Omie, Inc. and that sublease, with its modification, appears in the Knox County, Tennessee Register's Office Book 1840 Page 799 and Book 2071 Page 180. Exhibit A hereto was/is an assignment of a sublease explicitly identified. When the "ASSIGNMENT OF LEASE" (Exhibit A hereto) states that it assigned to Orange Tee, Inc. "the

following described property," it obviously did not convey the 5.71 acres because it did not own the 5.71 acres to convey. The most which Colonial could have assigned is a leasehold right to the 5.71 acres. The leasehold, however, is no broader than the Lease from which it derives. From the language above quoted, it is clear that the Lease limited the leasehold rights of Colonial allowed it to assign the entire Lease and, if Colonial wished to do anything with less than the entire Lease, it could sublet and sublet only.

No person has ever surfaced presenting itself/himself as a tenant/lessee of the 5.71 acres. Had such been the case, the Partnership would have refused to recognize any such purported rights. However, the problem has never presented itself because neither Orange Tee, Inc. nor any other persons has ever represented to the Partnership that it/he was a tenant/lessee of the Partnership. Further, the Partnership has never received any rent from Orange Tee, Inc. for any portion of the demised property.

If Colonial purported to assign to Premiere Investment Properties, Inc. anything less than the entirety of the leasehold represented by the Lease, the assignment was, and remains, a nullity. It is immaterial what the intent of Colonial was and what the intent of Premiere Investment Properties, Inc. was. Again, all Colonial could transfer was its leasehold, and, again, its leasehold is nothing more than what is described by way of rights and obligations in the Lease. Therefore, Colonial either assigned to Premiere Investment Properties, Inc. the entire leasehold evidenced by the Lease covering the entirety of 93.85 acres of demised premises or transferred to Colonial nothing.

The Partnership was not a party, an acquiescer nor a ratifier of the assignment (or now perhaps purported assignment) from

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Colonial to Premiere Investment Properties, Inc., and, consequently, the Partnership is not knowledgeable with respect to the terms of any document evidencing that transaction. The same is true with respect to the assignment (or now, perhaps, purported assignment) of Premiere Investment Properties, Inc. to Pioneer Investment Services Company. The Lease does not require the Partnership's tenant/lessee to secure prior consent or permission of the Partnership in order to assign. The Partnership has presumed the regularity of the assignments and, therefore, presumed that the assignments have been made in accordance with the provisions of the Lease.

If Premiere Investment Properties, Inc. or Pioneer Investment Services Company chose to agree with Colonial, as part of the terms of the assignment from Colonial, to leave in place the sublease to Orange Tee, Inc. evidenced by Exhibit A hereto, this certainly is a permissible bargaining point between Colonial and its assignees and of no interest to the Partnership. If, because of such an agreement between Colonial and its assignees, Debtor and Debtor's predecessor, Premiere Investment Properties, Inc., did not consider themselves to "have" the 5.71 acres because they had placed it beyond their ability to use it and had agreed not to disturb the possession of the subtenants then in possession of the property, this in no way diminished the size of the demised premises by 5.71 acres nor did it relieve Debtor or Premiere Investment Properties, Inc. of its responsibilities to the Partnership with respect to the use of the property and payment of real property taxes on it.

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Respectfully Submitted,

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s/ Larry E. Parrish
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

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by placing a copy of same in the U.S. Mail, postage prepaid, this 24th day of May 1989.

s/ Larry E. Parrish

APPENDIX C — RELEVANT STATUTES

28 U.S.C. § 151

§ 151. Designation of bankruptcy courts.

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 152

§ 152. Appointment of bankruptcy judges.

(a)(1) The United States court of appeals for the circuit shall appoint bankruptcy judges for the judicial districts established in paragraph (2) in such numbers as are established in such paragraph. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). However, upon the expiration of the term, a bankruptcy judge may, with the approval of the judicial council of the circuit, continue to perform the duties of the office until the earlier of the date which is 180 days after the expiration of the term or the date of the

appointment of a successor. Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

(2) The bankruptcy judges appointed pursuant to this section shall be appointed for the several judicial districts as follows:

DISTRICTS	Judges
Alabama:	
Northern	5
Middle	2
Southern	2
Alaska	2
Arizona	5
Arkansas:	
Eastern and Western	3
California:	
Northern	9
Eastern	6
Central	19
Southern	4
Colorado	5
Connecticut	2
Delaware	1
District of Columbia	1
Florida:	
Northern	1
Middle	4
Southern	3

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Georgia:
- Northern 6
- Middle 2
- Southern 2

Hawaii 1
Idaho 2
Illinois:
- Northern 10
- Central 3
- Southern 1

Indiana:
- Northern 3
- Southern 4

Iowa:
- Northern 2
- Southern 2

Kansas 4
Kentucky:
- Eastern 2
- Western 3

Louisiana:
- Eastern 2
- Middle 1
- Western 3

Maine 2
Maryland 3
Massachusetts 4
Michigan:
- Eastern 4
- Western 3

Minnesota 4

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(3) Whenever a majority of the judges of any court of appeals cannot agree upon the appointment of a bankruptcy judge, the chief judge of such court shall make such appointment.

(4) The judges of the district courts for the territories shall serve as the bankruptcy judges for such courts. The United States court of appeals for the circuit within which such a territorial district court is located may appoint bankruptcy judges under this chapter for such district if authorized to do so by the Congress of the United States under this section.

(b)(1) The Judicial Conference of the United States shall, from time to time, and after considering the recommendations submitted by the Director of the Administrative Office of the United States Courts after such Director has consulted with the judicial council of the circuit involved, determined the official duty stations of bankruptcy judges and places of holding court.

(2) The Judicial Conference shall, from time to time, submit recommendations to the Congress regarding the number of bankruptcy judges needed and the districts in which such judges are needed.

(c) Each bankruptcy judge may hold court at such places within the judicial district, in addition to the official duty station of such judge, as the business of the court may require.

(d) With the approval of the Judicial Conference and of each of the judicial councils involved, a bankruptcy judge may be designated to serve in any district adjacent to or near the district for which such bankruptcy judge was appointed.

(e) A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal. Before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges.

28 U.S.C. § 158

§ 158. Appeals.

(a) The district court of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decreees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district

court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner

as appeals in civil proceedings generally are taken to the court of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

11 U.S.C. § 362

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of this case

under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceedings before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title, or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity

contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101(34)[sic(38)], 741(5) or 761(15) of this title, or settlement payment, as defined in section 101(35)[sic(39)] or 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which

the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument.

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of a final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App USC 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred

ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App USC 1117 and 1271 et seq., respectively), or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App USC 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App USC 1117 and 1271 et seq., respectively); or

(14) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash,

securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement.

(15) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an education institution; or

(17) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 (20 USC 1001 et seq.) or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the

stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 365

§ 365. Executory contracts and unexpired leases.

(a) Except as provided in section 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to —

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this section and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the

lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegations of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory

contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

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(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

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(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed

under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1307, or 1208 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1307, or 1208 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease or timeshare plan as terminated by virtue of its own terms,

applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract

as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchasedr remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused bvy the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subseciton (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

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(k) Assignment by the trustee to an entity of a contract or lease asumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejectin if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under app;licable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of set off it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract,, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Govenors of the Federal Reserve System, or its predicessors or successors, to maintain the capital of an insured depository institution, and nay claim for a subsequent breach of the obligations thereunder

shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

OPPOSITION

BRIEF

(3)

No. 91-1625

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In The

Supreme Court of the United States

October Term, 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PIONEER INVESTMENT SERVICES COMPANY

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APPENDIX

Appendix A — Petitioner's Memorandum in Support of Motion to Lift Stay Filed May 25, 1989 ..... 1a

No. 91-1625

In The

Supreme Court of the United States

October Term, 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PIONEER INVESTMENT SERVICES COMPANY

STATEMENT OF THE CASE

A. Facts.

On April 12, 1989 (the "Filing Date"), Pioneer filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. In its schedule of assets, Pioneer listed its interest in an unexpired lease of nonresidential real property under which Pioneer is the lessee and the Cain Partnership is the lessor (the "Lease").

Pioneer acquired its interest in the Lease from the original lessee pursuant to an assignment agreement dated April 13, 1987. Pioneer developed the Towne & Country Shopping Center and the Commons at Towne & Country on a portion of the leased premises (the "Leased Premises"). Pioneer's interest in the Leased Premises has a value of approximately $27,000,000. On May 18, 1989 Pioneer filed, pursuant to Section 365 of the Bankruptcy Code ("§ 365"), a motion to assume the Lease (the "Assumption Motion"). Pioneer filed the Assumption Motion to protect its interest in the Leased Premises and to prevent Cain Partnership from realizing a "windfall" by virtue of Pioneer's bankruptcy.

On May 24, 1989, Cain Partnership filed an objection to the Assumption Motion and a motion for relief from the automatic stay (the "Stay Motion") so that it could repossess the Leased Premises. Cain Partnership alleged that the Lease had automatically terminated prior to the Filing Date since Pioneer failed to pay certain taxes due under the Lease. Notwithstanding the fact it took no action prepetition to terminate the Lease, and the Lease has no termination clause, Cain Partnership alleged in its Stay Motion that this default automatically terminated the Lease and entitled Cain Partnership to repossess the Leased Premises.

The bankruptcy court, in addressing the Assumption Motion and the contentions of Cain Partnership, found that (1) the Lease

had not terminated prior to the Filing Date; and (2) Pioneer satisfied the requirements of § 365 for assumption of the Lease. The district court affirmed the decision of the bankruptcy court. In particular, the district court stated, "Judge Stair therefore ruled correctly that [Pioneer's] leasehold had not been terminated on or before the date of [Pioneer's] filing of its petition for relief, because of the lack of any affirmative action on the part of the [Cain] Partnership to terminate it." (Petition, App. D, 40a).

Cain Partnership appealed these decisions to the Sixth Circuit. While that appeal was pending, Cain Partnership, for the first time, raised jurisdictional issues by filing a motion pursuant to Federal Rule of Civil Procedure 60(b)(4) (the "60(b)(4) Motion") on October 9, 1990. This 60(b)(4) Motion sought to vacate the orders of the district court and bankruptcy court approving Pioneer's assumption of the Lease.

Thus, prior to October 9, 1990, Cain Partnership, at no time, challenged the jurisdiction of the bankruptcy court or the district court. On the contrary, Cain Partnership's own Memorandum of Law in support of its Stay Motion stated, "It is the contention of the [Cain] Partnership that the [Bankruptcy] [C]ourt has sufficient jurisdiction over [Pioneer] to require the turnover [of the Leased Premises] and that exercise of that jurisdiction is appropriate under the circumstances." (App. A).

The bankruptcy court denied Cain Partnership's 60(b)(4) Motion and found that the Assumption Motion and Stay Motion were core proceedings over which it had jurisdiction. In particular, the bankruptcy court stated, "The Bankruptcy Court undisputedly has jurisdiction to determine what is property of the estate." (Petition, App. I, 61a). The district court affirmed the ruling of the bankruptcy court that Cain Partnership's 60(b)(4) Motion was groundless.

On appeal, the Sixth Circuit affirmed the district court both as to its decision granting the Assumption Motion and denying Cain Partnership's 60(b)(4) Motion.

B. Cain Partnership's Misstatements of Fact and Law.

Cain Partnership makes several misstatements of fact and law in its petition to this Court. Among the most egregious misstatements of fact is its assertion that, "From the moment Pioneer scheduled an interest in the Property, Cain overtly challenged the basis for jurisdiction over Pioneer's claim. . . ." (Petition, 6). The truth is that, not only did it not challenge the jurisdiction of the bankruptcy court, Cain Partnership expressly consented to bankruptcy court jurisdiction.[1]

Pioneer filed the Assumption Motion on May 18, 1989. It was not until the bankruptcy court and district court ruled adversely to Cain Partnership (and while its appeal was pending before the Sixth Circuit) that Cain Partnership challenged the jurisdiction of the bankruptcy court, and the district court. Thus, a period of almost 17 months passed before Cain Partnershp raised any jurisdictional issues whatsoever.

Cain Partnership also speciously asserts that it "was not given an opportunity by the bankruptcy judge to express a position with respect to whether the proceeding was 'core' or 'non-core', or

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1. Cain Partnership's Stay Motion expressly recognized the jurisdiction of the bankruptcy court. Specifically, its Memorandum of Law in support of the Stay Motion stated, "It is the contention of the Partnership that the court has sufficient jurisdiction over the Debtor to require the turnover and that exercise of that jurisdiction is appropriate under the circumstances." (App. A). Thus, contrary to Cain Partnership's assertions, the Stay Motion was not "a frontal assault on the court's jurisdiction." (Petition, 6). Rather, the Stay Motion was a frontal assault on Pioneer's Assumption Motion which, like the Stay Motion, was a core proceeding. 28 U.S.C. § 157(b)(2)(G) and (M).

with respect to consent." (Petition, 7). This assertion is misleading for two reasons. First, it implies that Cain Partnership overtly contested the jurisdiction of the bankruptcy court, and that the bankruptcy court disregarded Cain Partnership's contentions. As the record shows, Cain Partnership never contested the jurisdiction of the bankruptcy court until October 9, 1990, which was more than 17 months after Pioneer filed the Assumption Motion. Second, this contention erroneously suggests that a party is powerless to contest the jurisdiction of a bankruptcy court.

The statutes delineating bankruptcy court jurisdiction provide a panoply of protections for a party wishing to contest bankruptcy court jurisdiction. In particular, Cain Partnership could have brought a motion pursuant to 28 U.S.C. § 157(b)(3) ("§ 157(b)(3)") for a determination of the status of this proceeding before the bankruptcy court. Further, Cain Partnership could have filed a motion with the district court for the withdrawal of the reference to the bankruptcy court pursuant to 28 U.S.C. § 157(d). Finally, Cain Partnership could have brought an abstention motion pursuant to 28 U.S.C. § 1334(c)(1).

It is incumbent upon a party to exercise these statutory rights. Cain Partnership chose not to pursue these avenues and impliedly waived its right to contest bankruptcy court jurisdiction. Further, as its Memorandum of Law in support of its Stay Motion reveals, Cain Partnership expressly agreed that the bankruptcy court was the appropriate forum to resolve the matters at hand. Thus, Cain Partnership has not been "the victim of a classic jurisdiction by ambush" (Petition, 27); rather, Cain Partnership is a victim of its own consent and neglect in failing to pursue its available alternatives to challenge the jurisdiction of the bankruptcy court.

Cain Partnership's "Statement of Facts" is also misleading because it virtually ignores the origin of this case which is Pioneer's

Assumption Motion, not Cain Partnership's Stay Motion.[2] In particular, Cain Partnership states that, "This litigation began with a lease dispute between Cain and Pioneer Investment Services Company, the debtor-in-possession ('Pioneer'), which erupted in Bankruptcy Court when Pioneer listed an interest in Cain's property. . . ." (Petition, 4). This introductory sentence is misleading for two reasons. First, there was no dispute between Pioneer and Cain Partnership prior to the Filing Date. As the record reveals, Cain Partnerhsip made no attempt, prior to the Filing Date, to either terminate the Lease or to compel Pioneer to pay the past due taxes. Second, this statement implies that Pioneer did not properly list its interest in the Lease in its schedules of assets.[3]

Contrary to Cain Partnership's assertion, Pioneer had a legitimate reason for listing the Lease on its schedules of assets. Pioneer built a $27,000,000 shopping center on the Leased Premises. This fact, coupled with the failure of Cain Partnership to even notify Pioneer of an alleged default under the Lease, clearly shows that Pioneer not only had a legitimate reason to list the Lease on its schedules of assets, but also, to assume it.

The petition of Cain Partnership also contains numerous misstatements of law. Cain Partnership's contentions, that there is a conflict among the circuits concerning implied consent of

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2. It was Pioneer's Assumption Motion, not Cain Partnership's Stay Motion, which precipitated the proceeding now before this Court. Resolution of the Assumption Motion was not necessarily dependent upon resolution of the Stay Motion. (Petition, 6 fn. 7).

3. Cain Partnership makes the disingenuous argument that, "[U]pon the mere listing by the debtor of an interest in any property, whether Cain's real estate, the Taj Mahal or one of the Justices' leather chairs, federal jurisdiction automatically attaches . . . ." (Petition, 20). Pioneer's interest in the Leased Premises was not hypothetical; rather, Pioneer was in possession of the Leased Premises on the Filing Date.

a party pursuant to 28 U.S.C. § 157(c)(2) ("§ 157(c)(2)"), and that this "conflict" merits Supreme Court review, are misleading for two reasons. First, this case arises from a contested matter — not an adversary proceeding. Contested matters are governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") which omits any reference to the Bankruptcy Rules governing consent in adversary proceedings. Thus, the alleged split among the circuits, which arises from these rules, is totally inapposite to the case before this Court. Second, contested matters are core proceedings by their very nature. Contested matters invoke substantive rights provided solely by title 11 and can arise only in the context of a bankruptcy case. Pioneer's Assumption Motion clearly invokes a right provided solely by title 11 and therefore is a core proceeding. The fact that the Assumption Motion is a core proceeding obviates any need for this Court to examine the issue of consent.

Cain Partnership's second misstatement of law is that there is no federal jurisdiction under 28 U.S.C. § 1334(d) if Pioneer had no interest in the Lease. This assertion is incorrect since, even if the Lease had terminated prepetition (which it did not), Pioneer still retained possession of and had a naked possessory interest in the Leased Premises. This equitable interest was sufficient to confer jurisdiction upon the bankruptcy court.

SUMMARY OF ARGUMENT

This case does not raise any Article III concerns which this Court must address because (1) the decision of the lower courts are consistent with the opinions of this Court; (2) Pioneer's Assumption Motion is a core proceeding; and (3) bankruptcy courts have subject matter jurisdiction regardless of whether a proceeding is core or noncore. Since the assumption is a core proceeding, the issue of consent is irrelevant. Further, even if this proceeding was considered noncore, Cain Partnership expressly

consented to the jurisdiction of the bankruptcy court. Finally, Cain Partnership's petition is ill-suited to resolve the apparent conflict among the circuits because the case before this Court arises in the context of a contested matter — not an adversary proceeding.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO CAIN PARTNERSHIP'S ASSERTIONS, THIS CASE DOES NOT RAISE ANY ARTICLE III CONCERNS WHICH THIS COURT MUST ADDRESS.

A. The Decisions Of The Lower Courts Are Not In Conflict With The Decisions Of This Court.

This case raises no structural Article III concerns due to the unique nature of bankruptcy rights. "The right of a bankrupt or a debtor to have his affairs would up in a court of bankruptcy is a federal right explicitly recognized by the Constitution. . . as well as by Congress." *In re Skinner*, 917 F.2d 444, 449 (10th Cir. 1990) quoting, *In re Walters*, 868 F.2d 665, 670 (6th Cir. 1989). The power of Congress to promulgate legislation regarding bankruptcy subsumes the power to provide for the determination of those rights. *Crowell v. Benson*, 285 U.S. 22, 85 (1931) (Brandeis, J., dissenting). Since the power to assume a lease arises solely from Congress' Article I bankruptcy authority, Congress may provide for the determination of this right. Thus, "[t]here is no reason inherent in the separation of power principles to accord the state law character of a claim talismanic power in Article III inquiries." *Commodity Futures Trading Commission v. Schor ("Schor")*, 478 U.S. 833, 853 (1986).

Contrary to Cain Partnership's protestations, the fact that

non-Article III courts decide contested matters is of no moment. This Court has held that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593-94 (1985). The Bankruptcy Code, and § 365 in particular, is exactly the type of integrated regulatory scheme which allows bankruptcy courts to resolve state law issues which merely are tangential to bankruptcy rights.

Cain Partnership conveniently omits that bankruptcy courts are not independent of the district courts; they are subordinate adjuncts of the Article III district courts. 28 U.S.C. § 151; *In re Tom Carter Enterprises, Inc.*, 44 B.R. 605, 608 (C.D. Cal. 1984). Thus, bankruptcy courts are continually under the aegis of Article III governance and there are no structural Article III concerns raised by the case before this Court. *United States v. Raddatz*, 447 U.S. 667 (1980). In the absence of any such concerns it is clear that Cain Partnership not only could, but did, waive its right to Article III court determination of its tangential state law claim. *Schor, supra*; *Crowell v. Benson, supra*.

The decisions of this Court clearly establish that Article III does not confer on litigants an absolute right to the plenary consideration of every nature of their claim by an Article III court. *Schor, supra*, at 848; *Thomas v. Union Carbide Agricultural Products Co., supra*; *Crowell v. Benson, supra*. Moreover, the decisions of this Court hold that, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. *Schor, supra*, at 848-49. Since bankruptcy court resolution of Cain Partnership's tangential state law claim does

not in any way emasculate Article III courts, Cain Partnership clearly waived whatever personal right it may have had to Article III adjudication of this claim. *Schor, supra*, at 850.

B. The Distinction Between Public And Private Rights Is Irrelevant To The Constitutional Concerns Raised By Cain Partnership.

Attempting to further obfuscate the issue, Cain Partnership raises the issue of whether the restructuring of debtor/creditor relationships is in fact a public right capable of non-Article III court adjudication. (Petition, 18 citing *Granfinanciera, S.A. v. Nordberg* ("*Granfinanciera*"), 492 U.S. 33, 56 fn. 11 (1989).) The murky distinctions between public and private rights add nothing to resolving the alleged constitutional concerns raised by Cain Partnership.

First, the distinction between public rights and private rights has never been definitively explained by this Court.[4] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* ("*Marathon*"), 458 U.S. 50, 69 (1982). Second, "[t]his Court has rejected any attempt to make determinative for Article III purposes the distinction between public and private rights." *Schor, supra*, at 853. Accordingly, the public/private rights distinction is not determinative of bankruptcy court jurisdiction. Rather, bankruptcy court jurisdiction arises from the fact that Congress, acting pursuant to its valid Article I legislative purposes, may create rights which can be delegated to non-Article III courts.

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4. *Marathon* never held that restructuring debtor/creditor relationships is a public right. Thus, it is difficult to see why the footnote in *Granfinanciera* cited by Cain Partnership requires this Court to examine yet again the Gordian Knot of public versus private rights.

1. Contested matters are always core proceedings since they involve rights created by Congress pursuant to its Article I bankruptcy powers.

The Bankruptcy Amendment and Federal Judgeship Act of 1984 ("BAFJA") does not provide an exclusive list of what constitutes core proceedings nor does it provide a definition of noncore proceedings. The definition of the distinction was left to case law which emerged subsequent to BAFJA. Not surprisingly, attempting to draw distinctions between core and noncore proceedings is a "Sisyphean task." *See, In re United Security & Communications, Inc.*, 93 B.R. 945, 954 (Bankr. S.D. Ohio 1988). The problem in making such distinctions is that a "bankruptcy judge is constantly enmeshed in state law issues." *Marathon*, 458 U.S. 50, 97 (1982) (White, J., dissenting).

The court in *Matter of Wood*, 825 F.2d 90 (5th Cir. 1987), provided a clear definition of a core proceeding. In *Matter of Wood*, the Fifth Circuit held, "[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Id.* at 97.

Pioneer's Assumption Motion clearly invoked a substantive right provided solely by title 11. It is only by virtue of § 365 that a debtor may cure defaults under a lease and assume it. Accordingly, it is beyond cavil that a motion to assume a lease is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) ("§ 157(b)(2)"). *See, Harley Hotels, Inc. v. Rain's Intern., Ltd.*,57 B.R. 773 (M.D. Pa. 1985); *In re Windmill Farms Management Co.*, 116 B.R. 755 (Bankr. S.D. Cal. 1990); *In re New York Deli, Ltd.*, 75 B.R. 797 (Bankr. D. Hawaii 1987); *In re Acolyte Electric Corp. v. City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986); *In re Nexus Communications, Inc.*, 55 B.R. 596 (Bankr. E.D.N.C. 1985); *Matter of Republic Oil Corp.*, 51 B.R. 355 (Bankr. W.D.

Wis. 1985); *In re Turbowind, Inc.*, 42 B.R. 579 (Bankr. S.D. Cal. 1984).

In fact, the statutory framework Congress created with the Bankruptcy Code reveals that all contested matters are core proceedings. Bankruptcy Rules 1017(d), 3020(b)(1), 4001(a), 4003(d), and 6006(a) make explicit the types of motions to which Bankruptcy Rule 9014 applies. These rules govern respectively the dismissal or conversion of a case, objections to confirmation of a plan, relief from the automatic stay and the use of cash collateral, avoidance of a lien under § 522(f) of the Bankruptcy Code, and the assumption or rejection of executory contracts or unexpired leases. 9 *Collier on Bankruptcy*, ¶ 9014.01, p. 9014-1, 2 (15th ed. 1992). All of these proceedings clearly involve substantive rights provided solely by title 11. As a result, contested matters are core proceedings by their very nature. 28 U.S.C. § 157(b).

By enacting the Bankruptcy Code, Congress created a closely integrated regulatory scheme for restructuring debtor/creditor relations. In particular, § 365 was designed to resolve lease disputes quickly. The speed with which a debtor can make decisions to assume or reject unexpired leases of nonresidential property has a profound impact on the value of these leases to the bankruptcy estate. Accordingly, it is not surprising that lease assumption motions are conducted in the context of a contested matter and not an adversary proceeding. "The formal procedural approach for adversary proceedings set out in Part VII is, taken as a whole, inappropriate to decide contested matters where the issues may be relatively simple or where expedition is necessary." 9 *Collier on Bankruptcy*, ¶ 9014.05, p. 9014-5 (15th ed. 1992). Thus, the burdens of the formal procedures of adversary proceedings are inappropriate for contested matters.

2. The tangential state law concerns raised by Cain Partnership are irrelevant to the determination of the core/noncore status of this case.

Although Cain Partnership attaches great significance to the tangential state law issues which underlie its objection to Pioneer's Assumption Motion, these concerns are irrelevant to the determination of the core status of Pioneer's Assumption Motion. Congress recognized that state law permeates the bankruptcy process. Accordingly, § 157(b)(3) provides:

> *A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.*

28 U.S.C. § 157(b)(3). (Emphasis supplied).

As the plain language of § 157(b)(3) (and the holding of *Matter of Wood)* reveals, Pioneer's Assumption Motion is a core proceeding. First, a motion to assume an unexpired lease of nonresidential real property invokes a substantive right provided solely by title 11. Second, the plain language of § 157(b)(3) provides that the determination of noncore status shall not be made solely on the basis of state law. "The source of the cause of action, not the governing substantive law, is to be determinative." 1 *Collier on Bankruptcy,* ¶ 3.01, p. 3-53 (15th ed. 1992).

The flaw in Cain Partnership's argument is that it focuses exclusively on the governing substantive law and ignores completely the source of the cause of action (*i.e.,* Pioneer's Assumption Motion). The source of Pioneer's Assumption Motion is § 365 — a right that is created by and exists solely by virtue of federal law. Both the plain language of the statute and the case law show that no jurisdictional significance arises simply because the

resolution of Pioneer's Assumption Motion is affected, in part, by state law. *See, Harley Hotels, Inc. v. Rain's Intern., Ltd., supra,* at 781; *In re New York Deli, Ltd., supra,* at 801; *Matter of Republic Oil Corp., supra,* at 357-58.

Contrary to Cain Partnership's assertions, this case does not involve adjudication of state created private rights. Cain Partnership asserts incorrectly that if Pioneer's interest in the Lease was properly terminated prepetition, which it was not, there would be no federal jurisdiction under 28 U.S.C. § 1334(d) ("§ 1334(d)"). (Petition, 20). The plain language of § 1334(d) provides:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, *and of property of the estate.*

28 U.S.C. § 1334(d). (Emphasis supplied). Since property of the estate includes all legal or equitable interests of the debtor, even if the Lease had terminated prepetition, Pioneer still retained possession of and had a naked possessory interest in the Leased Premises as of the Filing Date. 11 U.S.C. § 541(a)(1); *In re Waterkist Corp.*, 775 F.2d 1089, 1092 (9th Cir. 1985).[5]

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5. Unlike Cain Partnership, which took no prepetition action whatsoever to terminate the Lease, the landlord in *In re Waterkist Corp.* took action sufficient to terminate the debtor's lease. Notwithstanding this termination, the Ninth Circuit found that the equities strongly favored the debtor since it would stand to lose over one million dollars in improvements to the leased premises as opposed to a default under the lease in the amount of $27,301.52.

C. Bankruptcy Courts Have Subject Matter Jurisdiction Regardless of Whether The Proceeding Is Core Or Noncore.

In a further attempt to create Article III concerns, Cain Partnership asserts that § 157(c)(2) violates Article III since the stipulation by the parties does not create subject matter jurisdiction. (Petition, 22). This argument is flawed for two reasons. First, § 157(c)(2) is inapposite since the case currently before the Court is a core proceeding. Second, and most importantly, Cain Partnership totally ignores the distinction between subject matter jurisdiction and core/noncore proceedings. Section 157(c)(2) does not violate Article III because a bankruptcy court has subject matter jurisdiction regardless of the core or noncore status of a proceeding. *See, In re General American Communications Corp.*, 130 B.R. 136, 154 (S.D.N.Y. 1991); *In re Wefco, Inc.*, 97 B.R. 749, 751 (E.D.N.Y. 1989); *In re Kelton Motors, Inc.*, 121 B.R. 166, 181 (Bankr. D.Vt. 1990); *In re Treadway*, 117 B.R. 76, 81 (Bankr. D.Vt. 1990). Thus, there are no structural Article III concerns raised by § 157(c)(2) because the parties are not conferring subject matter jurisdiction by their consent. The core/noncore distinction affects only the ability of the bankruptcy court to enter a final order. *In re General American Communications Corp., supra,* at 154.

Section 1334 and § 157 define the source of bankruptcy court jurisdiction. Pursuant to these sections, a bankruptcy court has subject matter jurisdiction over both core and noncore proceedings once the district court has referred cases and proceedings under title 11 to the bankruptcy judges for the district. 28 U.S.C. § 157(a). Cain Partnership's argument fails because the parties do not, by their consent, confer subject matter jurisdiction. Rather, Congress confers primary subject matter jurisdiction upon the district courts, which in turn have referred this jurisdiction to the bankruptcy courts. Since bankruptcy courts are subordinate adjuncts of the district courts, BAFJA does not create a situation

in which the parties, by consent, confer subject matter jurisdiction, which does not otherwise exist, upon a non-Article III court.

II.

THE SIXTH CIRCUIT'S FINDING THAT CAIN PARTNERSHIP CONSENTED TO THE JURISDICTION OF THE BANKRUPTCY COURT IS CORRECT.

A. Cain Partnership Waived Its Right To Contest The Core Nature Of This Proceeding.

Pioneer filed its Assumption Motion on May 18, 1989 and Cain Partnership filed its Stay Motion on May 25, 1989. It was not until October 9, 1990 that Cain Partnership raised for the first time the issue of whether the bankruptcy court had jurisdiction over these motions. Cain Partnership stood silent on the issue of jurisdiction for seventeen (17) months while it actively litigated Pioneer's Assumption Motion. In fact, these jurisdictional arguments arose only after the bankruptcy court and the district court ruled adversely to Cain Partnership. Thus, it is clear that Cain Partnership's contention, that the bankruptcy court lacked jurisdiction, is nothing more than an afterthought.

Contrary to its assertions, Cain Partnership never overtly challenged the jurisdiction of the bankruptcy court from the inception of these proceedings. (Petition, 6). Cain Partnership's assertion that it was never given the opportunity to "express a position with respect to whether the proceeding was core or non-core" is equally disingenuous. (Petition, 7). If Cain Partnership desired to express a position as to whether Pioneer's Assumption Motion was core or noncore it could, and should, have brought a motion pursuant to § 157(b)(3) for a determination as to the

status of the proceeding.[6] This, Cain Partnership did not do even though the plain language of § 157(b)(3) requires such a motion to be timely. As a result, Cain Partnership waived not only its right to require the bankruptcy court to make a core/noncore determination, but also, its right to contest jurisdiction once the bankruptcy court determined the matter was a core proceeding. *In re Johnson*, 1992 WL 57087, *3 (4th Cir. 1992); *In re Men's Sportswear, Inc., supra; In re Rath Packing Co.*, 75 B.R. 137, 138 (N.D. Iowa 1987), *aff'd*, 860 F.2d 1086 (8th Cir. 1988).

This Court has recognized that courts, by necessity, have jurisdiction to determine their own jurisdiction over the parties and subject matter by rendering a judgment. *Stoll v. Gottlieb*, 305 U.S. 165 (1938). "After a federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which a plea of *res judicata* is made does not have the power to inquire again into that jurisdictional fact." *Id.* at 172. Thus, notwithstanding an erroneous conclusion about jurisdiction, a court's previous decision as to its jurisdiction will be *res judicata* as to any subsequent attack made on that court's jurisdictional determination — regardless of whether jurisdiction was actually contested. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).

This Court has recognized that courts, by necessity, have jurisdiction to determine their own jurisdiction over the parties and subject matter by rendering a judgment. *Stoll v. Gottlieb*, 305 U.S. 165 (1938). "After a federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which a plea of *res judicata* is made does not have the

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6. Likewise, Cain Partnership could have brought an absention motion pursuant to 28 U.S.C. § 1334(c)(1) or a motion for the district court to withdraw the reference to the bankruptcy court pursuant to 28 U.S.C. § 157(d) neither of which Cain Partnership pursued.

power to inquire again into that jurisdictional fact." *Id.* at 172. Thus, notwithstanding an erroneous conclusion about jurisdiction, a court's previous decision as to its jurisdiction will be *res judicata* as to any subsequent attack made on that court's jurisdictional determination — regardless of whether jurisdiction was actually contested. *Republic Supply Co., v. Shoaf,* 815 F.2d 1046 (5th Cir. 1987).

The jurisdictional determination of the bankruptcy court and the district court was not, however, erroneous. The contested matter giving rise to this petition clearly was a core proceeding. Cain Partnership knew the bankruptcy court considered Pioneer's Assumption Motion a core matter; however, it never objected to jurisdiction until it received an adverse ruling. As a result, Cain Partnership impliedly, if not expressly, consented to the bankruptcy court's entry of a dispositive order in this core matter. *In re Men's Sportswear, Inc., supra; Republic Supply Co. v. Shoaf, supra.*

B. Section 157(c)(2) Does Not Require Express Consent Of The Parties To The Jurisdiction Of A Bankruptcy Court.

The Cain Partnership has taken a passing comment of the Sixth Circuit, that this proceeding is perhaps noncore, and turned it into the Leviathan now before this Court. Cain Partnership construes this comment to mean that for its consent to be a valid waiver of its objection to bankruptcy court jurisdiction, the consent had to be express because only express consent is valid in adversary proceedings.

The fatal flaw of this argument is that § 157(c)(2) does not require the *express* consent of the parties. (Emphasis supplied). The relevant portion of this statute merely provides:

> [T]he district court, with the consent of all the

> parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge . . . .

Had Congress desired the express consent of the parties as a prerequisite to the exercise of bankruptcy court jurisdiction pursuant to § 157(c)(2), it certainly could have done so. Congress required the explicit consent of the parties for a magistrate to exercise jurisdiction pursuant to Section 636(c)(2) of the Magistrate's Act. Unlike the Magistrate's Act, the jurisdictional statute of the Bankruptcy Code does not require the explicit consent of the parties for a bankruptcy court to exercise noncore jurisdiction. Rather, explicit consent is required only in the Bankruptcy Rules; and there, only in adversary proceedings.

Because the Bankruptcy Rules require express consent only in adversary proceedings, several problems exist for Cain Partnership's argument. First, the case before this Court arises from a contested matter, not an adversary proceeding. Accordingly, the Bankruptcy Rules requiring express consent in adversary proceedings do not apply to this contested matter. Second, if the Bankruptcy Rules conflict with the bankruptcy statutes, the bankruptcy statutes take precedence over the Bankruptcy Rules. *In re Belmont Realty Corp.*, 112 B.R. 4, 5 (Bankr. D.R.I. 1990); *In re Roberts*, 68 B.R. 1004, 1005 (Bankr. E.D. Mich. 1987). To the extent a rule is inconsistent, the statute governs. 1978 *U.S. Code & Cong. Admin. News*, pp. 5787-6405.

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS APPLICABLE TO THIS CASE.

A. The Apparent Conflict Among The Circuits As To The Necessity Of Express Consent To Bankruptcy Court Jurisdiction In Adversary Proceedings Is Not Relevant To Contested Matters.

The case before the Court arises from a contested matter not an adversary proceeding. Pioneer filed its motion to assume the Lease on May 18, 1989. Cain Partnership was served with notice of this motion. Cain Partnership, in turn, filed a motion on May 25, 1989 requesting that the bankruptcy court lift the automatic stay. No summons was issued for either motion. In short, the case now before the Court does not arise from an adversary proceeding.

Contested matters are governed by Bankruptcy Rule 9014 which provides:

> The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071.

Noticeably absent from the list of rules applicable to contested matters are Bankruptcy Rules 7008 and 7012. "[Rule 7012] is not mentioned in Rule 9014 and, therefore, is not expressly applicable to contested matters." 9 *Collier on Bankruptcy*, ¶ 7012.03, p. 7012-4 (15th ed. 1992).

The inapplicability of Bankruptcy Rules 7008 and 7012 to

contested matters is a crucial distinction which eliminates the need for this Court to resolve any alleged conflict among the circuits. The alleged conflict among the circuits arises directly from the plain language of Bankruptcy Rules 7008 and 7012.[7] As can be seen from the plain language of Bankruptcy Rules 7008 and 7012, and their omission from Bankruptcy Rule 9014, consent in a contested matter need not be express.

The cases Cain Partnership cites to support its proposition that there is a conflict among the circuits all involve adversary proceedings. *In re Brickell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991); *In re Davis*, 899 F.2d 1136 (11th Cir. 1990); *Home Insurance Co. v. Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989); *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987); *In re Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). As a result, the alleged conflict between the decisions of the Seventh and Eleventh Circuits and those of the Second and Sixth Circuits involve procedural postures completely different from the current case before this Court.[8] Since this case involves a contested matter,

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7. Bankruptcy Rule 7008, in relevant part, provides:

> In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

Bankruptcy Rule 7012, in relevant part, provides:

> In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

8. Pioneer notes that the Ninth Circuit, like the Second and Sixth Circuits, (Cont'd)

it is ill-suited to resolve a conflict among the circuits involving the issue of implied consent in adversary proceedings.

B. The Apparent Conflict Among The Circuits Is A Result Of The Timing Of The Decisions.

The alleged conflict among the circuits is illusory. The apparent disparate positions of the circuits is explained easily by the timing of the decisions. The relevant language of Bankruptcy Rules 7008 and 7012, requiring express consent in adversary proceedings, was added by amendments to the Bankruptcy Rules which became effective August 1, 1987. The Seventh and Eleventh Circuits issued their decisions after the enactment and effective date of these amendments. The Sixth and Ninth Circuits rendered their decisions prior to the enactment of these amendments.

Although the Second Circuit rendered its opinion after August 1, 1987, the holding in *In re Men's Sportswear, Inc.* is distinguished by its unique procedural posture. While this decision ultimately involved an adversary proceeding, the debtor did not initiate the adversary proceeding until after the bankruptcy court approved the debtor's motion to assume certain licensing agreements.

The debtor, Men's Sportswear, Inc. ("Sportswear"), had entered into several licensing agreements with Sasson Jeans, Inc. ("Sasson") prepetition. Sportswear filed for Chapter 11 protection on October 14, 1983 and thereafter made a motion to assume these Sasson licensing agreements. Sasson vigorously opposed Sportswear's assumption motion and the assumption was not approved by the bankruptcy court until May of 1986. Two weeks

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(Cont'd)
agrees that consent to bankruptcy court jurisdiction pursuant to § 157(c)(2) may be implied. *See, In re Daniels-Head & Associates*, 819 F.2d 914 (9th Cir. 1987). This case, also involved an adversary proceeding.

after prevailing on the assumption motion, Sportswear filed an adversary proceeding against Sasson for breach of contract under the licensing agreements. The bankruptcy court awarded Sportswear more than one million dollars in damages in the adversary proceeding which it determined was a core proceeding.

On appeal from the judgment in the adversary proceeding, Sasson raised jurisdictional concerns for the first time. In particular, Sasson contended that Sportswear's adversary proceeding was a noncore proceeding. The Second Circuit disagreed stating, "We are inclined to treat Sportswear's breach of contract action as a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M)." *Id.* at 1137. The Second Circuit, however, declined to resolve the issue of whether the matter was core or noncore by finding that Sasson had impliedly consented to the bankruptcy court's jurisdiction.

The implied consent found by the Second Circuit is perhaps best explained by Sasson's three year litigation concerning Sportswear's assumption motion. At no time during this contested matter did Sasson challenge the jurisdiction of the bankruptcy court. In fact, the Second Circuit noted, Sasson's jurisdictional protest "more closely resembles an afterthought than a bona fide objection." *Id.* at 1138. As a result, *In re Men's Sportswear* does not necessarily stand for the proposition that a party may impliedly consent to a noncore adversary proceeding. First, the proceeding was core. Second, the consent was implied from the more than three years Sasson litigated the assumption motion which clearly was a core proceeding.

Thus, the disparate holdings of the Second, Sixth, Seventh, Ninth and Eleventh Circuits are not, as the Cain Partnership argues, irreconcilable. The 1987 amendments obviously have made the Sixth and Ninth Circuit holdings of dubious validity as to noncore adversary proceedings. Further, the Second Circuit

holding clearly involved implied consent to a core proceeding. In short, there is no conflict among the circuits which this Court needs to address.

CONCLUSION

Cain Partnership's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION TO LIFT STAY FILED MAY 25, 1989

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CASE NO. 389-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession.

MOTION OF THE CAIN PARTNERSHIP, LTD. IN SUPPORT OF ITS MOTION TO LIFT THE STAY TO PERMIT MOVANT TO REPOSSESS THE PREMISES FORMERLY DEMISED BY THE COLONIAL ENTERPRISES LEASE AND FOR AN ORDER TO REMOVE DEBTOR-IN-POSSESSION FROM SAID PREMISES

PREFACE

The issue created by the "Motion To Lift The Stay To Permit Movant To Repossess The Premises Formerly Demised By The Colonial Enterprises Lease And For An Order To Remove Debtor-In-Possession From Said Premises" (herinafter "Partnership's Motion") is simple to state, and there exists conclusive authority resolving the issue. The **issue is:** Did the April 11, 1974 lease, as amended, between The Cain Partnership, Ltd. and Colonial Enterprises, Inc. (hereinafter "the Lease") terminate prior to the date (April 12, 1989) on which Debtor filed its petition for relief in the instant case?

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If, as The Cain Partnership, Ltd. (hereinafter "the Partnership") contends, the posited question must be answered in the affirmative, the former leasehold represented by the Lease, to which Debtor was the assignee, is not property of the bankruptcy estate of Debtor. If, as the Partnership also contends, the former leasehold is not property of Debtor's estate, the automatic stay pursuant to Title 11, *United States Code* § 362(a) does not bar the Partnership from regaining possession.

A subsidiary issue involves whether this court has jurisdiction to require Debtor to turn over the formerly demised premises to the Partnership. It is the contention of the Partnership that the court has sufficient jurisdiction over Debtor to require the turnover and that exercise of that jurisdiction is appropriate under the circumstances.

STATUS OF CASE

On April 12, 1989, Pioneer Investment Services Company, Debtor-In-Possession (hereinafter "Debtor") voluntarily filed a Petition for Relief in the instant case. Concomitantly therewith, the automatic stay mandated by Title 11, *United States Code* § 362(a) became effective enjoining claims against or to the estate of Debtor.

The Partnership's Motion, which this memorandum supports, sets out the facts which the Partnership is prepared to prove. To repeat those facts here would be duplicitous. Therefore, the factual presuppositions underlying the remainder of this memorandum are those which appear in and as a part of the Partnership's Motion.

Appendix A

PROCEDURAL APPROPRIATENESS OF INSTANT MOTION

At first blush, there might appear to be a logical inconsistency in the contention by the Partnership that, at the same time, the Lease is not "property" of the estate which is protected by the § 362 automatic stay and that the court should lift the § 362 automatic stay in order to allow the Partnership to obtain possession of it. However, the breadth and penal nature of the automatic stay requires the present procedure. The Partnership is enjoined by the § 362 stay from even giving notice to Debtor to remove itself from the demised premises. This subject has been addressed by case authority in the past.

In particular, the following language is instructive as it appears in *In re: Pagoda International, Inc., Debtor,* 26 B.R. 18 (Bankr. D.Md. 1982) at 20:

> Thus, as pointed out by Pagoda in its brief, it does have a scintilla of equitable interest in the premises. *In Re Andorra Meat Market, Inc.,* 7 B.R. 744, 746 (B.E.D. Pa. 1980). It is this scintilla of interest that triggered the protection of § 362(a). Having the protection in place, it then became incumbent upon the landlord, as it did here, to proceed with this action. *In Re Lewis,* 15 B.R. 643 (B.E.D.Pa. 1981). The situation is not unlike that discussed by Judge Kahn in *Matter of Mimi's of Atlanta, Inc.,* 5 B.R. 623, 627 (B.N.D.Ga. 1980). There, the court noted that even though the leases had been terminated the debtors had a **tenancy by sufferance**.

Bankruptcy Judge William Houston Brown recently

recognized that Tennessee law, likewise, considers such a tenant to be a tenant at sufferance, saying so in *In Re: Memphis-Friday's Associates, Debtor,* 88 B.R. 830 (Bankr. W.D.Tenn. 1988) at 837:

> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. . . . [I]n fact, it has been held that where a lessee remains in possession following default and consequent termination of the lease, the lessee is a **"tenant at sufferance"** of the lessor. *See,* e.g., *In re Maxwell,* 40 B.R. 231, 237 (Bankr. N.D.Ill. 1984); *Metropolitan Life Ins. Co. v. Moore,* 167 Tenn. 620, 72 S.W.2d 1050, 1051 (1934).

Reference directly to the opinion in *Metropolitan Life Ins. Co. v. Moore, supra,* further establishes the proposition saying as follows in 167 Tenn. at 624:

> At common law a mortgagor holding possession "after condition broken" is a "tenant at sufferance" of the mortgagee, according to *Underhill on Landlord and Tenant,* sec. 167; *Fuller v. Wadsworth,* 24 N.C. (2 Ired), 263, 38 Am.Dec., 692; *Ford v. Steele,* 54 Vt., 562.

For more detail with respect to the parameters of rights of a tenant at sufferance is available in 51 C.J.S., *Landlord and Tenant,* p. 779, § 175 et seq. and by reference to the discussion in *Knight v. Haley,* 176 A. 461, 464 (Del. 1934).

One distinction with respect to a tenant at sufferance is that one occupying leased premises as such has neither a legal nor an

equitable interest in the demised premises. *Hughes v. Monnahan,* 282 Minn. 407, 165 N.W.2d 231, 233 (1969). The fact that a debtor which is a tenant at sufferance possesses no interest in the occupied premises which is of any benefit to any creditor of debtor is indicated by the following language from *In re Pagoda International Inc., Debtor, supra,* 26 B.R. at 20:

> The fact that the state processes have not been completed as to Pagoda does not mean that any interest is left other than the common law tenancy at sufferance. In fact, it is not a tenancy, but **permissive occupation.** It **is inalienable** by Pagoda.

In the context of discussing the inalienability of the rights of one tenant by the entirety in Tennessee, this court, twice previously, has found occasion to recognize that whatever interest a debtor in bankruptcy has as a mere tenant by the entirety is inalienable and, because of this, that interest is not part of the bankruptcy estate. *In re Garretson,* 6 B.R. 127 (Bankr. E.D.Tenn. 1980); *In re Dawson,* Debtor, 10 B.R. 680 (Bankr. E.D.Tenn. 1980).

In bankruptcy, the issue of what a debtor possesses as a tenant at sufferance has been many times discussed, and, each time, the result is the same. While the interest might be enough to initially trigger the protection of a § 362(a) automatic stay, it is not enough to allow the right which initially enabled the debtor to occupy previously demised premises to be considered "property" of the bankruptcy estate. *David L. Trask, Trustee in Bankruptcy of Magic Spuds, Inc.,* 376 F.2d 17, 20, 21 (5th Cir. 1967); *In re Maxwell, Jr., Debtor,* 40 B.R. 231, 236, 237, 238 (Bankr. N.D. Ill. 1984); *In re Masterworks, Inc., Debtor,* 94 B.R. 262, 265, 266, 267 (Bankr. D.Conn., 1989); *In re M & R Apparel, Inc.,*

Debtor, 92 B.R. 565, 568, 569 (Bankr. D. Conn 1988); *In re Memphis-Friday's Associates,* 88 B.R. 830, 837, 840, 841, 842, 843 (Bankr. W.D. Tenn. 1988); *In re Ahrens, Debtors,* 64 B.R. 5, 6, 7 (Bankr. E.D.Pa. 1986); *In re Black, Debtor,* 58 B.R. 60, 61, 62 (Bankr. E.D.Pa., 1986); *In the Matter of: Condominium Administrative Services, Inc., Debtor(s),* 55 B.R. 792, 795, 796, 797, 798, 799 (Bankr. M.D.Fla. 1985); *In re Players' Pub, Inc., Debtor,* 45 H.R. 387, 391, 392, 393 (Bankr. D.Mass. 1985); *In re Gray, Debtors,* 37 B.R. 532, 535, 536, 537 (Bankr. N.D.Ga. 1984); *In re Doan's Truck Repair, Inc., Debtor,* 34 B.R. 180, 183) (Bankr. D.Wy. 1983); *In re Foxfire Inn of Stuart Florida, Debtor,* 30 B.R. 30, 31, 32 (Bankr. S.D.Fla. 1983); *In re Pagoda International, Inc., Debtor,* 26 B.R. 18, 20, 21, 22 (Bankr. D.Md. 1982); *Executive Square Office Building v. O'Connor And Associates, Inc.,* 19 B.R. 143, 146, 147, 148, 149 (Bankr. N.D.Fla. 1981); *In re Victory Pipe Craftsmen, Inc., Debtor,* 8 B.R. 635, 636, 637 (Bankr. N.D.Ill., E.D. 1981).

It is generally held that a tenant at sufferance, as a permissive occupant of formerly demised property, has no further entitlement to permissive occupancy after receiving notice from the owner to turnover. In the instant case, the Partnership did not give notice prior to the April 12, 1989 filing of the petition in this case. However, on the present state of the record, the Partnership is automatically enjoined from giving such a notice. But, it is generally conceded that the filing a public proceeding with service on a party to the proceeding is considered notice. Therefore, the Partnership's Motion, under any scheme of things, constitutes permissible notice to Debtor.

Hyper-technicality might dictate that the Partnership be given partial release from the automatic stay to give Debtor notice to quit the formerly demised premises. If Debtor refused to heed

the notice, the Partnership might be required to come back to this court to seek a further partial lifting of the automatic stay to allow the Partnership to commence state court proceedings to oust Debtor. Such a process might be subject to classification as form over substance.

In order for this court to determine whether any lifting of the stay, in response to the Partnership's Motion, is appropriate, it will have to determine whether or not the Lease terminated prior to April 12, 1989, the filing date of Debtor's Chapter 11 petition. That is, if the Lease did not terminate, it constitutes an unexpired lease which Debtor is entitled to affirm or reject provided certain other conditions are met.

Because the Lease will probably constitute a substantial portion of the value reported as property by Debtor, to refer the matter to state court to be resolved, in essence, would amount to turning this entire case over to General Sessions. If this court determined that the Lease was terminated prior to April 12, 1989, for this court to refer the matter to state court for eviction proceedings, likewise, might seem to catapult form over substance. The state court would be bound by the law of the case with respect to the issue of termination and would have nothing more to do than issue writs and occupy the time of the Sheriff when the same might more simply be accomplished by this court.

STATUTORY PROVISIONS IMPLICATED

In pertinent part, Title 11, *United States Code* § 362 provides as follows:

> (a). . . . [a] petition filed . . . operates as a stay, applicable to all entities of —

Appendix A

* * *

(3) any act to obtain possession of . . . property of the estate or of property from the estate or to exercise control over property of the estate;

* * *

(c) . . . (1) the **stay** of an act against property of the estate under subsection (a) of this section **continues until** such property is no longer property of the estate;

* * *

(d) On request of a party in interest and after notice and a hearing, the **court shall grant relief from the stay** provided under subsection (a) of this section, such as by terminating, . . . such stay- . . . (2) with respect to a stay of an act against property under subsection (a) of this section, **if** — (A) the **debtor does not have an equity** in such property; . . . .

In pertinent part, Title 11, *United States Code* § 365(c) states as follows:

The trustee **may not assume** . . . any . . . unexpired **lease** of the debtor, . . ., **if** — . . . (3) such lease is of nonresidential real property and has been **terminated** under applicable nonbankruptcy law **prior to the order for relief.**

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In pertinent part, Title 11, United States Code § 541(b)(2) states as follows:

> Property of the estate does not include — . . . (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under the lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

GOVERNING CASELAW

There are certain governing rules which are universally accepted and which have present application so that mere statement of them is here sufficient. These rules are recognized in an article entitled "The Postpetition, Pre-Rejection, Pre-Assumption Status of An Executory Contract" which appears in 59 *American Bankruptcy Law Journal* 197 (1985). Quotation of the rule with which the Partnership's Motion is most concerned might be helpful. This appears in 59 ABLJ at 201:

> (1) *May the DIP resurrect an executory contract that terminated prior to the filing of the Chapter 11 petition?* (emphasis in original)
>
> * * *
>
> To this question the answer is clearly no. The DIP may not reinstate, revive, or otherwise resurrect a contractual relationship that in fact ended prior

to the date of the filing. In such a case, there is no executory contract for the debtor to assume or reject.[19]

* * *

19. *See*, e.g., *In re Triangle Laboratories, Inc.*, 663 P.2d 463, 467-468 (3rd Cir. 1981) ("An executory contract or lease validly terminated prior to the institution of bankruptcy proceedings is not resurrected by the filing of the petition in bankruptcy, and cannot therefore be included among the debtor's assets."); *In re New Media Irjax, Inc.*, 19 Bankr. 199, 201 (Bankr. M.D.Fla. 1982) ("If the executory contract was effectively cancelled prior to the intervention of bankruptcy, there remains nothing for the Debtor to assume."); *In re Benrus Watch Co. Inc.*, 13 Bankr. 331, 334 (Bankr. S.D.N.Y. 1981) ("Contracts that have been effectively terminated prior to the filing of a chapter 11 petition cannot be revived by the bankruptcy court.").

Whether the contract which the DIP seeks to assume or reject actually expired prior to the date of filing is generally a question of state law, a point recognized by most courts.[20]

* * *

20. *See, Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1212 (7th Cir.), *cert. denied* 105 S.Ct.386 (1984): ("If a contract has been terminated pre-

> bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law.") *See also In re Bricker*, 43 Bankr. 344 (Bankr. D. Ariz. 1984).

In recent cases, Judge Lundin has commendably analyzed at what point, under Tennessee law, a **residential** lease expires under the Bankruptcy Code. Of course, an unexpired residential lease is specially protected by Title 11, *United States Code* § 362(b)(10). Under § 362(b)(10), a residential lease can be assumed by a debtor unless, pre-petition, the residential lease has **"expired."**

This is in contrast to the Bankruptcy Code provision with respect to nonresidential real property leases. With respect to **nonresidential** leases, a debtor is prohibited from assuming the benefits or obligations of such a lease if, pre-petition, the lease had **"terminated."** *See* Title 11, *United States Code* § 365(c)(3). Thus, an unexpired, but terminated, nonresidential lease cannot be assumed, post-petition, by a debtor.

Judge Lundin exhaustively concludes that a lease of residential property cannot be considered "expired" under Tennessee law until after execution of a Writ of Possession. *In re Talley*, 69 B.R. 219 (Bankr. M.D.Tenn. 1986); *In re Goodloe*, 61 B.R. 1016 (Bankr. M.D.Tenn. 1986). Of particular interest are the following words of Judge Lundin, quoted from *In re Talley, supra*, 69 B.R. at 223:

> It is doubtful that Congress intended to allow debtors to contract away trustee's power of

> assumption through a lease term which equates a default with "termination." **"Termination," "default" and "expired" are not coextensive;** to allow full equation would thwart the Congressional intent that trustees (and Chapter 13 debtors) may cure defaults for the benefit of the estate pursuant to § 365.

More recently, Bankruptcy Judge Brown has, with equal thoroughness as Judge Lundin, considered when, under Tennessee law, a nonresidential (commercial) lease is "terminated" for the purposes of Title 11, *United States Code* § 365(c)(3). *In re Memphis-Friday's Associates, supra.*

The *Memphis-Friday's* case involved a commercial lease of a restaurant. The debtor attempted to assume the lease after its Chapter 11 petition was filed. The landlord objected and based its objection on the contention that the lease terminated pre-petition. In support of its contention, the landlord established that, pre-petition, landlord gave debtor written notice dated April 18, 1988 that its lease would terminate on April 30, 1988 "due to debtors noncompliance with terms of the written lease." The lease provided a five day cure period for cure on non-payment of rent and a 10 day cure period for other breaches. However, though it was not discussed in the opinion, some of the breached (e.g., failing to obtain permission of the landlord before making repairs) were incurable. By way of background the court stated as follows in the *Memphis-Friday's* case:

> The undisputed evidence in the instant proceeding establishes that the Debtor **closed** its operation and commenced renovations at the restaurant on January 18, 1988. The renovations were

undertaken pursuant to a provision in the Debtor's modified franchise agreement with Friday's, Inc. that it would take steps necessary to conform its restaurant operation to the standards required by the franchisor. . . . At closing, the estimated time for completion of the renovations was two months, while the estimated cost was $250,000.00. The **Debtor failed to satisfy the lease** requirements **that it obtain permission** for renovations from the landlord, provide the landlord with specifications for the work to be done, and submit to the landlord performance and labor and material payment bonds or financial statements exhibiting a sufficient net worth of the Debtor, (citations omitted) . . . [t]he landlord sent notice of such failure, ... (citations omitted) Additionally, on March 1, 1988, the Debtor failed to make its rental payment for that month. Notice . . . with instructions to cure same, was sent and received, via certified mail, on March 16, 1988. (citations omitted)

On March 17, 1988, the Tennessee Department of Employment Security filed a lien against the Debtor's property . . . . (citations omitted) [c]ontractor performing the renovations . . . filed a materialmen's lien . . . . (citations omitted). [T]hese liens are alleged to be in further contravention of the lease.

On April 12, 1988, the Debtor again failed to pay its monthly rental and on April 18, 1988, the landlord sent the Debtor the "notice of Termination and Notice of Additional Defaults"

via certified mail. The notice specifies the above defaults and provides that in light thereof, the "Lease and Term thereof will terminate on April 30, 1988." (citations omitted).

Mr. Victor, an officer of the Debtor, Maruki Tennessee "F," Inc. and of Maruki U.S.A. Co. Inc. testified that he attempted several times to cure the defaults by proposing settlement offers but that the landlord "would not let him pay."

* * *

The equities do not favor this Debtor, . . . [T]he bankruptcy court is a court of equity. *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). 'It is, however, a court of equity under the law.' *In re Costell*, 75 B.R. 348, 353 (Bankr. N.D. Ohio 1987). The equity of the court does not reach to this Debtor, especially in view of the mandate of the Code. 11 U.S.C. Section 365(c)(3). As Justice White recently observed for the unanimous court in *Northwest Bank Worthington v. Ahlers*, 108 S. Ct. 963, 968-969 (1988): **'[w]hatever equitable powers remain in the bankruptcy courts must and can only he exercised within the confines of the Bankruptcy Code.'**

* * *

[T]he court concludes that the newer, specific Section 365(c)(3) governs over the older, more general Section 108(b). 'It is a well established

> maxim of statutory interpretation that when Sections of an act can be construed consonantly, the should be so interpreted.' *I.T.T. Small Business Finance Corp. v. Frederigue*, 82 B.R. 4, 6 (E.D. N.Y. 1987), citing, *Sutherland Stat. Const.* Sections 51.01, 51.02 (4th Ed.). However, a consonant reading may not always be possible. In *Bank of Commonwealth v. Bevan*, 13 B.R. 989 (E.D. MI. 1981), the District Court construed Section 108(b) to be more specific than Section 362(a) and thus Section 108(b) limited the automatic stay in that case. Id. at 994. However, in the case of Memphis-Friday's Section 365(c)(3) is more specific and limiting than Section 108(b). In *In re Eldorado, Inc.*, 85 B.R. 555, 557 (Bankr. D. Mont. 1987), the court reasoned that Section 108(b) did not act to extend time for curing of pre-bankruptcy defaults in executionary contracts. This is consistent with the Seventh Circuit in *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215 (7th Cir. 1984), *cert denied*, 469 U.S. 982, 105 S.Ct. 386. As the *Moody* court observed: 'Section 365 specifically governs the time for curing defaults in executionary contracts, and thus, it controls here.

In the *Memphis-Friday's* case, Judge Brown found that the nonresidential lease there in question was terminated prior to the time when the debtor filed its Chapter 11 petition. Because the enunciation of Tennessee law by Judge Brown is definitive, with respect to the issue at hand, extensive quotation seems appropriate. Particularly, it is said as follows in *In re Memphis-Friday's Associates, supra*, 88 B.R. at 836-837:

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It is argued by the Debtor that, notwithstanding the above events, the lease has not been properly terminated under Tennessee law because termination requires actual re-entry by the landlord, commencement of a suit for possession, or issuance of a writ of possession. For this proposition, the Debtor cites the court to [citations omitted].

Each of these cases is readily distinguishable from the proceeding at bar in the first instance because they involve residential real estate. Unlike the proceeding sub judice, the cases cited by the Debtor involve a determination of when a debtor's leasehold or freehold interest in residential real estate is "expired" or "forfeited" rather than a determination of **when a non-residential lease is "terminated"** for purposes of Section 365(c). Accordingly, these cases stand for the proposition that a freehold interest is not forfeited prior to a foreclosure sale and that a lease is not "expired" prior to the issuance of a writ of possession pursuant to Tennessee law and when, for purposes of Section 365(a) of the *Bankruptcy Code*, the subject property is residential [citations omitted].

* * *

This line of reasoning was reiterated in the 1986 Pizza Pumps of America case, *supra*. There, the Tennessee Court of Appeals was faced with a commercial **lease** which **provided** that **no notice** of default **or opportunity to cure** was required for

> the lessor to treat the lease as forfeited when rental payments were overdue. The Court held that the lease was to be construed as written and as such, the **lessee had "lost all legal interest in the lease by forfeiture in not paying the rent on time."** (citation omitted)
>
> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. In addition, these cases clearly illustrate that a commercial lease may be **terminated** by the lessor **regardless of possession.**
>
> * * *
>
> In order to fully assess Debtor's rights under the Code, the court has considered whether the Debtor has complied with Section 365(b)(1). (footnote omitted) To reach this consideration, the court would be required to find that an unexpired lease existed for assumption by the Debtor, and **the court has found and concluded that there is no lease for assumption.**

Reference to *Pizza Pumps of America Inc. v. Krispy Kreme Doughnut Corporation, et al.*, 11 TAM 52-13 (Tenn.App., W.S., October 31, 1986), a copy of which is attached hereto, is helpful. For instance, the Court of Appeals stated as follows:

> Pizza Pumps filed its complaint alleging breach of contract and wrongful eviction on May 23, 1984. The Chancellor dismissed the complaint, and

awarded Krispy Kreme arrearages in rent and taxes, attorney's fees and costs on its countercomplaint.

The essential dispute between the parties is whether the lease, . . ., required that notice of default and opportunity to cure within thirty days be granted when rental payments were overdue. Krispy Kreme interprets the **lease** as allowing **no grace period to cure** a default from non-payment of rent, while **Pizza Pumps insists that it complied in good faith** with the terms of paragraph 15 in **tendering payment to cure.**

* * *

We find that this provision makes it clear that overdue rental payments cannot be extended by granting thirty days to remedy, absent the express written consent of the lessor.

* * *

We **do not doubt** that Vella, the president of **Pizza Pumps, subjectively interpreted the lease in this manner;** however, the written terms of the lease must control: in the absence of fraud or mistake, a contract must be interpreted and enforced as written **even though** it contains terms which may be thought **harsh and unjust.** *Ballard v. North American Life & Casualty Co.*, 667 S.W.2d 79, 82 (Tenn. App. 1983).

* * *

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> **We hold** that the written language of paragraph 15, taken as a whole, must be construed to mean that **no notice** of default **and opportunity to cure is required** when rental payments are overdue. Therefore, the lessor could properly choose its option of treating the lease as forfeited, null, and void upon failure to **pay** rent installments **when due.**
>
> Pizza Pumps urges that **estoppel** by course of dealing, i.e., **by accepting late rental payments in the past,** should prevent Krispy Kreme from revoking its leasehold rights. However, our construction of the lease makes it apparent that Pizza Pumps **lost all legal interest in the lease by forfeiture in not *paying* the rent *on time.* Estoppel** may be urged to protect a right, but it **can never create a right.** *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 71 S.W.2d 683, 684 (1934). (emphasis added)

The rule articulated in the *Memphis-Friday's* case and in the *Pizza Pumps* case is not without historical underpinning. To the contrary, though Judge Brown and Judge Highers found it unnecessary in opinions in *Memphis-Friday's* and *Pizza Pumps* to trace the historical roots dictating the results reached with respect to when the lessees under those commercial leases lost all legal rights deriving from the subject leases, what resulted was simply application of plain vanilla law longstanding and entrenched in Tennessee. The essence of the *Memphis-Friday's* and the *Pizza Pumps* rulings is that a commercial lease is nothing more and nothing less than a contract between the lessor and the lessee. The courts took note of the fact that there were no statutory

provisions which gave special protections to such (non-residential) lease/contracts. Also, at least by implication, the courts essentially proceeded on the assumption that there was no disparity in bargaining power at the inception of the commercial leases which required evening-up in order for the law to provide equal footing to the contracting parties. Therefore, the courts, in *Memphis-Friday's* and *Pizza Pumps*, essentially, applied standard common law contract principles as the means by which to resolve the disputes.

One of those standard common law contract doctrines is known as the first breach. A recent and succinct statement of the rule may be found in *Sage of America Company v. Lucey Boiler Company*, TAM ____ (Tenn.App. W.S. October 9, 1987) perm. app. den. January 25, 1988, where the court states as follows in its slip opinion:

> A party who is determined to be in material breach of a contract has no right to rely on the contract terms. The non-breaching party has no further obligation to perform. (citations omitted). Gerep was therefore justified in terminating the contract.

There could hardly be a more indisputable, universally applicable (at least in Tennessee) and clear rule of law than that, when one party to a contract breaches the terms of the contract, the contract ends. The only thing left, thereafter, is for the parties to the contract to either disengage their affairs and any property theretofore encumbered by the contract or for the parties to make a new decision to continue the relationship created by the contract, which, even if continued precisely as it had been before the termination, in effect, is a new contract made just like the one which was in force previous to termination. *Cummins v. McCoy*,

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22 Tenn.App. 681, 691, 125 S.W.2d 509 (1938); *Santa Barbara Capital Corp. v. World Christian Radio Foundation, Inc.*, 491 S.W.2d 852, 857 (Tenn.App. 1972), *cert denied* March 19, 1973; *W.F. Holt Company v. A & E Electric Company, Inc.*, 665 S.W.2d 772, 730 (Tenn.App. 1983) perm. app. den. January 30, 1984; *Misco, Inc. v. United States Steel Corporation*, 784 F.2d 198, 202 n.2 (6th Cir. 1986); *Mr. Transmission, Div. of International Transtech Corporation v. Yount*, 13 TAM 29-14, 1988 Tenn.App.LEXIS 297 (Tenn.App. May 27, 1988); *Almany v. Nationwide Insurance Co.*, 12 TAM 10-6 (Tenn.App. M.S. January 29, 1987); 17 *AmJur2d* Contracts § 365 p. 807 and 17 *AmJur2d Supp.* pp. 222-223; *Restatement (Second) Contracts* § 237, § 241 (1979). The result reached in *Memphis-Friday's* and *Pizza Pumps* is nothing more than an undazzled application of a rule which is beyond dispute either on the oughtness or the existence level.

There are contracts with specific terms which, when the first breach rule is applied to them, yield a different result than when the same rule is applied to contracts without such provisions. That is, if a contract has as a part of it stated means by which the parties must terminate the contract, the explicit prerequisites of the contract will displace the common law rule which, as a matter of law, terminates the contract upon first breach. For instance, if a contract has a cure provision which requires a stated amount of advanced notice to provide an opportunity for the breaching party to cure the breach, the breach by the breaching party will not terminate the contract. Instead, the contract can be terminated only by the means explicitly set out in the contract. In such contracts, the breach by one party normally effectuates the termination provision and gives opportunity for the non-breaching party to set in motion the termination process; however, the termination itself cannot occur by a mere breach. But, the fact

that the first breach rule has an effect on contracts with provisions setting out the means of termination different from its effect on contracts with such provisions does not lessen the force of the first breach rule when applied to contracts without such explicit terms. *Micro Craft, Inc. v. Jones-Robertson, Inc.*, 10 TAM 14-8 (Tenn.App., W.S. Sitting at Nashville, March 6, 1985).

The Lease has no explicit provisions governing its termination. There is no advance notice requirement nor is there any other opportunity provided for either party to cure a breach. Therefore, termination is effectuated by the explicit common law governing termination of contracts where no explicit contract provision sets out the means by which termination must occur.

In the case of *In re Studebaker's of Fort Lauderdale Ltd.*, 73 B.R. 217 (Bankr. N.D.Fla. 1987), the court was faced with debtor's argument that it retained an equitable interest in a terminated commercial lease by virtue of its continued possession of the demised premises at the time of filing the petition for relief and that it would amount to an **unjust enrichment** to the landlord to prevent the debtor from assuming the lease post-petition. The words of the court are elucidating as follows in *In re Studebaker's of Fort Lauderdale Ltd., supra,* 73 B.R. at 218-220:

> The **debtor, . . ., asserts** that it has an equitable right to possession of the subject premises; that **due to the debtor's improvements of said property, the landlord will be unjustly enriched** if allowed to remain in possession; and that it is ready, willing, and able to tender the full amount owed on the rent arrearage, plus interest, costs, and attorney's fees to the landlord herein . . . . The landlord contests said motion, asserting that the

lease was validly terminated pursuant to state law prior to the debtor's filing . . . .

* * *

[m]any courts have ruled that such bare "hold over" possession by the tenant and/or inconclusive proceedings for repossession by the landlord gives the tenant a slight equitable interest which is property of the estate under § 541 and protected by the filing . . . .

* * *

Under § 365 of the Bankruptcy Code, the equitable considerations applied in the **Fontinbleau** [515 F.2d 913 (5th Cir. 1975)] have been **superseded by** specific statutory language addressing the assumption of leases. **§ 365(c)(3)** provides that: . . . . If the *lease* is thus terminated, as opposed to the tenant being dispossessed of the premises, then the trustee is precluded from assuming it. The presence of a slight equitable interest by virtue of possession of premises by a debtor has no bearing whatsoever on the issue of assumability of an unexpired lease. "Once a lease is terminated prior to the intervention of bankruptcy, the landlord-tenant relationship is gone regardless of the right of possession." (citation omitted).

* * *

Accordingly, the debtor had no interest in the lease

or the leasehold premises to be included as property of the estate under § 541 when this case was filed.

LEASE TERMINATION

As quoted on pages 3 and 4 of the Partnership's Motion, the Lease, unequivocally, conditions the right of the lessee to hold the demised premises on the explicitly stated condition that the lessee pay all real property taxes "***promptly when due.***" The Lease has no "ifs," "ands," "buts," or "ors" which in any way provides a caveat or exception with respect to whether or when real property taxes must be paid by the lessee in order for the lessee to preserve its right to hold the premises.

There could be no dispute with respect to the conditionality of the right of the lessee to hold the leased property or that failure to pay the real property taxes *when due* was a breach of the agreed-to condition which the lessee promised the Partnership it would perform at risk of forever losing its right to hold the demised premises.

The Lease has in it not one word which extends to the lessee any right to be notified by the Partnership that it has failed to keep its promise with respect to *promptly* paying the real property taxes *when due*. There are no words of any kind at any place in the Lease from which it could be implied that the Partnership ever undertook the obligation to provide notice to the lessee that, if it failed to keep its promise to pay the real property taxes, *promptly when due,* the Partnership would remind the lessee. Instead, the Partnership and the lessee, in very uncomplicated and abundantly clear language, agreed that the lessee would take full responsibility to pay the real property taxes when due, without prompting by the Partnership, and that the lessee would bear the

full consequences of its failure.

As stated on pages 4, 5 and 6 of the Partnership's Motion, the lessee, in the person of Debtor, allowed over $80,000 in real property taxes to accumulate, due but unpaid, from October 1, 1987 up through and including March 1, 1989.

By May 2, 1989, over $9,000 in interest, court costs and attorney's fees incurred by the taxing authorities in their efforts to collect the due, but unpaid, taxes had accrued and was continuing to accrue on a daily basis. The leased premises were threatened with and encumbered by tax liens because of Debtor's prolonged failure to abide by the condition which it promised to satisfy as an essential prerequisite of its right to possession of the leased premises.

There is no privity of contract between the Partnership and any persons or entities other than Colonial Enterprises, Inc. and its assignees or assignees of its assignees, the latest of which is Debtor. In other words, the Partnership looks to Debtor and to no other person nor entity for payment of the taxes as promised by Colonial Enterprises, Inc.

If persons or entities, in privity with Debtor, have breached agreements obligating such other persons to Debtor with respect to paying taxes, Debtor's remedy for losses suffered because of the termination of the lease is against those obligated to Debtor. None of this alters the fact that the Lease terminated upon failure of the lessee (Debtor) to live up to its promise to pay all real property taxes *promptly when due*. Since the first failure by the lessee (Debtor) to pay real property taxes promptly when due, on October 1, 1987, Debtor has been no more than, at best, a tenant at sufferance of the Partnership. The Partnership intends

to be at sufferance for no longer.

PARCEL 29.04

This section of this Memorandum relates specifically to what is addressed by the second "FOR FURTHER CAUSE" paragraph on page 2 of the Partnership's Motion which this memorandum supports. That is, a 5.71 acre portion of the 95.5 acres originally demised by the Lease (which is now Parcel 29.04 on Map 132) as to which there is (or at least was) a dispute between Debtor and the Partnership with respect to tenancy and occupancy. As stated in the Partnership's Motion, it is the Partnership's position that this 5.71 acres is part of the demised premises occupied and possessed by Debtor. It is (or was) the position of Debtor that this 5.71 acre Parcel 29.04 is not in Debtor's possession because it is not part of the premises demised by the Lease to Debtor. This is presently relevant to the Partnership's Motion because of the Partnership's request that Debtor be ordered to turnover the demised premises.

Debtor is (or at least was) apparently going to resist turnover of that 5.71 acre portion of the demised premises, if for no other reason, on the contention that Debtor did not possess the 5.71 acres to turnover. Dependent on the response of Debtor and other interested persons to the Partnership's Motion, the issue with respect to the 5.71 acres could become germane to an issue as yet not raised and, because this issue might be avoided altogether, it will not be broached here. But, if the issue is subsequently raised, reference back to what is discussed here, because of the turnover issue, will be made.

The Lease has specific language which operates to control whether Debtor possesses the 5.71 acres by virtue of the assignment

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from Premiere Investment Properties, Inc. to Debtor of the Colonial leasehold. The language appears succinctly as follows in enumerated paragraph 1 on page 3 of the Lease:

> This lease may be assigned or the leased premises may be sublet in whole or in part . . . .

As noted above, the Lease has never been amended, explicitly or implicitly, at any time which in any way modifies or allows deviation from the obligations imposed on the Partnership's tenant/lessee by the above-quoted words. Furthermore, the Partnership has never ratified or otherwise consented to any tenant/lessee's deviation from the obligations undertaken by the tenant/lessee as a result of the above-quoted words.

From the Partnership's standpoint, the above-quoted words ensure a vitally important arrangement by which the Partnership intended to be related to the demised property. More specifically, the Partnership never intended to have but one tenant/lessee responsible to the Partnership and to whom/which the Partnership could look for performance of all of the terms of the Lease. If the tenant/lessee of the Partnership chose to have one or a hundred and one subtenants, this was a decision left by the Partnership to the Partnership's tenant/lessee; however, no matter what decision the Partnership's tenant/lessee made with respect to subleasing the demised premises, this would in no way impact the fact that the Partnership would continue to have one responsible party, i.e., the Partnership's tenant/lessee.

The above-quoted language from the Lease allows that Partnership's tenant/lessee flexibility to remove itself from the relationship with the Partnership by replacing itself with ***an*** assignee. However, the Partnership's tenant/lessee could never

replace itself with multiple assignees. This would defeat the entire premise of the Lease by forcing the Partnership into direct relationships with more than one tenant/lessee. The Partnership protected itself from such a situation by the explicit above-quoted language in the Lease. **What is assignable is: "This lease."** What may be "sublet in whole or in part" is the "leased premises." However, "this lease" cannot be assigned "in whole or in part."

Attached to this memorandum as Exhibit A is a copy of a document entitled "ASSIGNMENT OF LEASE" entered into, according to what is said on its face, on February 1, 1984 and which is recorded as Instrument No. 293425 in Book 2094 on pages 077 and 078 which purports to transfer the subject 5.71 acres. It is the position of the Partnership that this document, at best, is a sublease from Colonial to Orange Tee, Inc.

The context is worthy of note. In February 1984, Colonial, since the inception of the Lease on December 11, 1974, had been the one and only tenant/lessee of the Partnership. There had been one, and only one, prior amendment (which is the only amendment there ever has been) to the Lease, and it occurred on April 1, 1977 and gave to Colonial 55 years of extended options and transferred from Colonial its leasehold on 1.65 acres of the 95.5 acres of demised premises.

The attached (Exhibit A hereto) "ASSIGNMENT OF LEASES" is signed by Orvis Milner for and as President of Colonial and by Orvis Milner for and as President of Orange Tee, Inc. The Partnership is not a party to the "ASSIGNMENT OF LEASE" nor has the Partnership affixed any seal or signature to it acknowledging or consenting thereto.

The language of the "ASSIGNMENT OF LEASE" is worthy

of direct quote as follows:

> Whereas, the Assignor (Colonial) is legally in the possession of certain property (further description of the 5.71 acres omitted) . . . which has been **sublet to Omie, Inc.,** under agreement dated August 7, 1978 (further description omitted) . . ., and
>
> Whereas, for good and valuable consideration, . . .paid by Assignee (Orange Tee Inc.) to Assignor (Colonial), the **following described property is hereby assigned from Colonial . . . to the Orange Tee, Inc.** who shall hereinafter stand in the stead and place of Assignor (Colonial) and be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 agreement.

Omie, Inc. is not a party to the "ASSIGNMENT OF LEASE" and has not signified any agreement or acquiescence to the document nor its contents. Likewise, Omie, Inc. has never raised any objection; therefore, presumably satisfactory arrangements were made between Omie, Inc. and Orange Tee, Inc. and Colonial.

What Orange Tee, Inc. assumed (i.e., "the following described property") is the sublease from Colonial to Omie, Inc. and that sublease, with its modification, appears in the Knox County, Tennessee Register's Office Book 1840 Page 799 and Book 2071 Page 180. Exhibit A hereto was/is an assignment of a sublease explicitly identified. When the "ASSIGNMENT OF LEASE" (Exhibit A hereto) states that it assigned to Orange Tee, Inc. "the

following described property," it obviously did not convey the 5.71 acres because it did not own the 5.71 acres to convey. The most which Colonial could have assigned is a leasehold right to the 5.71 acres. The leasehold, however, is no broader than the Lease from which it derives. From the language above quoted, it is clear that the Lease limited the leasehold rights of Colonial allowed it to assign the entire Lease and, if Colonial wished to do anything with less than the entire Lease, it could sublet and sublet only.

No person has ever surfaced presenting itself/himself as a tenant/lessee of the 5.71 acres. Had such been the case, the Partnership would have refused to recognize any such purported rights. However, the problem has never presented itself because neither Orange Tee, Inc. nor any other persons has ever represented to the Partnership that it/he was a tenant/lessee of the Partnership. Further, the Partnership has never received any rent from Orange Tee, Inc. for any portion of the demised property.

If Colonial purported to assign to Premiere Investment Properties, Inc. anything less than the entirety of the leasehold represented by the Lease, the assignment was, and remains, a nullity. It is immaterial what the intent of Colonial was and what the intent of Premiere Investment Properties, Inc. was. Again, all Colonial could transfer was its leasehold, and, again, its leasehold is nothing more than what is described by way of rights and obligations in the Lease. Therefore, Colonial either assigned to Premiere Investment Properties, Inc. the entire leasehold evidenced by the Lease covering the entirety of 93.85 acres of demised premises or transferred to Colonial nothing.

The Partnership was not a party, an acquiescer nor a ratifier of the assignment (or now perhaps purported assignment) from

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Colonial to Premiere Investment Properties, Inc., and, consequently, the Partnership is not knowledgeable with respect to the terms of any document evidencing that transaction. The same is true with respect to the assignment (or now, perhaps, purported assignment) of Premiere Investment Properties, Inc. to Pioneer Investment Services Company. The Lease does not require the Partnership's tenant/lessee to secure prior consent or permission of the Partnership in order to assign. The Partnership has presumed the regularity of the assignments and, therefore, presumed that the assignments have been made in accordance with the provisions of the Lease.

If Premiere Investment Properties, Inc. or Pioneer Investment Services Company chose to agree with Colonial, as part of the terms of the assignment from Colonial, to leave in place the sublease to Orange Tee, Inc. evidenced by Exhibit A hereto, this certainly is a permissible bargaining point between Colonial and its assignees and of no interest to the Partnership. If, because of such an agreement between Colonial and its assignees, Debtor and Debtor's predecessor, Premiere Investment Properties, Inc., did not consider themselves to "have" the 5.71 acres because they had placed it beyond their ability to use it and had agreed not to disturb the possession of the subtenants then in possession of the property, this in no way diminished the size of the demised premises by 5.71 acres nor did it relieve Debtor or Premiere Investment Properties, Inc. of its responsibilities to the Partnership with respect to the use of the property and payment of real property taxes on it.

Appendix A

Respectfully Submitted,

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s/ Larry E. Parrish
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

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Appendix A

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Appendix A

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by placing a copy of same in the U.S. Mail, postage prepaid, this 24th day of May 1989.

s/ Larry E. Parrish